

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 10Jul2002

CASE NO. 2001-SCA-17

In the Matter of:

U.S. DEPARTMENT OF LABOR,
Plaintiff

v.

ROOD TRUCKING COMPANY, INC.;
GEORGE, ROOD, President
Respondent

For the Petitioner,
Sandra B. Kramer, Esq.

For the Respondent,
Lessie Milton Jones, Esq.

Before: Richard A. Morgan
Administrative Law Judge

DECISION AND ORDER

BACKGROUND

This matter involves a dispute concerning the payment of prevailing wage rates and proposed debarment of the respondents, under the McNamara-O'Hara Service Contract Act, 41 U.S.C. § 351, *et seq.*, as amended, and its implementing regulations, found in title 29, Code of Federal Regulations, specifically 29 C.F.R. Parts 4, 5 and 6.

The Petitioner is the U.S. Department of Labor ("DOL"), represented by the Office of the Solicitor, U.S. Department of Labor, and the Respondent is Rood Trucking Company, Inc., (hereinafter "RTC" or "Rood Trucking") and Mr. George Rood, individually and as a corporate officer.

Two formal hearings were conducted in the matter, in Canfield, Ohio, February 26-27, 2002, and on April 9-10, 2002. The United States Department of Labor, the Respondent corporation and Mr. Rood were represented by counsel. The parties were given the full opportunity to present evidence and to examine and cross-examine witnesses. Petitioner exhibits ("PX") 1- 13, Respondent exhibits ("RX") 1- 16 and 19 - 23, and, Joint exhibits ("JX") 1- 5 were

admitted at the first hearing.¹ Mr. Marangoni's second deposition was allowed post-hearing and admitted as PX 14. Post-hearing briefs were submitted by the Petitioner and by the Respondents, on May 30, 2002.

The Administrator's Order of Reference states this is a dispute concerning the payment of prevailing wage rates, fringe benefits and the proposed debarment of the Rood Trucking and Mr. Rood.² The Administrator stated he had reasonable cause to believe the Respondents have disregarded their obligations to employees, under the Service Contract Act. It is alleged that during the period required for performance of the Respondent's mail hauling contract with the USPS they failed and refused to pay service employees, employed in the performance of the contract, the minimum monetary wages and fringe benefits as required by the contract, by sections 2(a)(1) and (2) of the SCA, and, by sections 4.6 of the regulations promulgated by the Secretary.

The government revised its allegation regarding the payment of fringe benefits at the hearing. There, rather than non-payment of fringe benefits as alleged earlier, it alleged that RTC had not made requisite quarterly payments into their employee pension funds through 2001 and sought an order requiring them to do so as required by SCA regulations. (TR 14-21). The government seeks debarment of the Respondents as well as payment of the back wages.

In its Reply to The Secretary's Response to the Order of Reference, the Respondents averred it had complied with both the contract and the SCA and is thus not liable for back wages or fringe benefits and is not subject to debarment. Moreover, it argued: the Secretary's Complaint failed to state a claim upon which relief could be granted; the Secretary's Complaint is barred, in whole or in part, because the Respondents acted in good faith and/or with objective reasonableness, under the provisions of the Act and regulations; and, the Complaint is barred, in whole or in part, because at all relevant times, the Respondents acted in compliance with its statutory and regulatory obligations. The Respondents sought dismissal of the Complaint.

ADMISSIONS

The Respondents have admitted that:

I. (a) Rood Trucking Company, Inc., is and, at all times relevant to this case, was an Ohio corporation having its principal office and place of business at 3505 Union Street, Mineral Ridge, Ohio

44440. It is and was, at all times relevant to this case, engaged at that place of business and at various locations throughout the U.S. in providing mail hauling services.

¹ Transcript testimony is denoted as "TR." Each reference to a TR page number will refer to the witness whose testimony is being discussed, unless otherwise indicated.

² The "Administrator" is the Administrator of the Wage & Hour Division, Employment Standards Administration, U.S. Department of Labor. 29 C.F.R. § 1.2(d). The "Order of Reference" serves as a "complaint." 29 C.F.R. § 6.30(B).

(b) Mr. George Rood is the president of RTC and is and was, at all times relevant to this case, responsible for the day-to-day employment policies and practices of RTC and for acting directly or indirectly in its interest in relation to its employees. As such, he is a party responsible within the meaning of § 3 of the SCA.

II. The U.S. government entered into a contract with Respondents, number 14424, on January 7, 1997, for the purpose of providing mail hauling services to the U.S. Postal Service (“USPS”). The contract was in excess of \$2,500 and was subject to and contained the representations and stipulations required by the SCA and its implementing regulations.

III. The mail hauling services required by the contract were furnished in the U.S. by the Respondents to the government of the U.S. through the use of “service employees” as defined by § 8(b) of the SCA.
(Hearing Transcript (“TR”) 10-11).

STIPULATIONS

1. The Respondents and or their employees are engaged in commerce or employed in an enterprise engaged in commerce.
2. RTC’s contract with the USPS has as its principal purpose furnishing services in the U.S., namely in New York, Pennsylvania, and Ohio through the use of service employees, as defined in § 8(b) of the Act and reiterated in 29 C.F.R. § 4.113(b).
3. RTC has provided identical contractual services to the USPS for almost thirty (30) years.
4. The renewal period of performance for (USPS) contract number 14424 was July 1, 1997 through June 30, 2001.
5. Contract 14424 includes ten different mail runs or trips.
6. Each mail run had a schedule established by RTC, primarily based on the USPS’s required departure and arrival times.
7. Certain route schedules included time for meals and breaks.
8. The RTC Company Handbook specifies drivers are relieved of all employment responsibilities during their breaks and were free to spend their time however they desired.
9. RTC employed ten (10) regular (truck) drivers, two (2) relay drivers and others as needed in order to effectuate the purpose of the contract.
10. The drivers employed on the contract were entitled to the following fringe benefits: health

and welfare (hospitalization) and pension.

11. The truck drivers performed pre-trip and post-trip inspections on each trip.
12. The following RTC employees received copies of the (Revised) RTC Employee Handbook on the dates indicated:

Larry Marangoni, March 3, 1995
Thomas Kelly , March 30, 1997
Thomas Whalen, May 29, 1993
Thomas Capoano, November 12, 1998

(JX 1 and 2: TR 22).

13. The parties agreed the applicable wage rates and fringe rates were as follows:
 - a. January 1, 1998 to June 30, 1999: \$14.41 and \$2.38
 - b. July 1, 1999 to June 30, 2000: \$15.18 and \$2.44
14. The parties additionally stipulated, should I rule in favor of the Secretary, that:
 - a. The amount of back wages due owing to pre-trip time, is \$13, 161.40.³ (Letter of April 30, 2002).
 - b. The amount due for the “break” times is \$106,000.00. (Letter of April 30, 2002).
 - c. The “unknown” driver referred to in earlier submissions was William Leathersich; and,
 - d. The amount of back wages due individuals is as set forth in the Rood Trucking Company Stipulated Back Wages. (Letter of May 21, 2002)(Appendix).

ISSUES

- I. Whether this forum has jurisdiction over the parties and subject matter of this dispute?
- II. Whether, during the period of the contract, Respondents failed and or refused to pay service employees, employed in the performance of Rood Trucking’s contract with the USPS the minimum monetary wages as required by the contract, by § 2(a)(1) of the SCA (41 U.S.C. § 351(a)(1)), and, by § 4.6 of the regulations (29 C.F.R. § 4.6)?
- III. Whether, during the period of the contract, Respondents failed and or refused to pay service employees, employed in the performance of Rood Trucking’s contract with the USPS, “fringe benefits” as required by the contract, by § 2(a)(2) of the SCA (41 U.S.C. § 351(a)(2)),

³ Shown as \$13, 156.97 in the Rood Trucking Company Stipulated Back Wages.

and, by § 4.6 of the regulations (29 C.F.R. § 4.6)?⁴

If Rood Trucking so failed, what were such fringe benefits and what was the value of the same?

IV. If the above-referenced employees were so non-paid, or underpaid, and/or not paid fringe benefits what is the amount each such employee was underpaid and the total amount owed by the Respondents?

V. If the Respondents are found to have violated the Service Contract Act, whether the respondents are to be relieved from the ineligible list, as provided in § 5(a) of the Act, and what are the unusual circumstances, within the meaning of § 5(a) of the Act, which are the basis therefore?

(TR 11-12).

THE LAW

SCA, FLSA and Regulations

The Service Contract Act of 1965 (McNamara-O'Hara Act), 41 U.S.C. § 351 *et seq.* - requires minimum wage, per 29 U.S.C. § 206(a)(1), and fringe benefits on U.S. government contracts over \$2,500. "The Act covers service contracts of the Federal agencies. . . the principal purpose of which is to furnish services in the United States through the use of service employees . . ." 29 C.F.R.

§ 4.110. "The Act's purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment. (See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. 3-4 (1965))." 29 C.F.R. § 4.104(b).

Contracts with the U.S. government, over \$2500, must contain the following clause:

(b)(1) Each service employee employed in the performance of this contract by the contractor . . . shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract.

29 C.F.R. § 4.6.

⁴ With the exception of quarterly fringe benefit contributions, limited to the period on and after January 1, 1998 through June 30, 2000. (TR 14).

The Act generally covers the following employees:

All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performance of other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see § 4.115 *et seq.*) is applicable.

29 C.F.R. § 4.150. Employees in bona fide executive, administrative, or professional capacity are excluded from coverage. 29 C.F.R. § 4.156. The Act makes no distinction between temporary, part-time, and full-time employees. The prevailing rate established by a wage determination under the Act is the minimum rate. 29 C.F.R. § 4.165(a)(2) and (c).

Employee coverage does not depend on form of employment contract. 29 C.F.R. § 4.155. The regulations define a “service employee” as:

. . . any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons. . .

Mail hauling contracts are covered by SCA. 29 C.F.R. § 4.130(a)(31). Such contracts are not exempted by the provisions dealing with carriers subject to published tariff rates. 29 C.F.R. § 4.118.

The regulations specify who may be liable for violations of the Act:

The term ***party responsible*** for violations in section 3(a) of the Act (SCA) . . . An **officer** of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract is a party responsible and liable for the violations individually and jointly

with the company. (*S & G Coal Sales, Inc.*, Dec. of Hearing Examiner, PC-946, Jan. 21, 1965, *aff’d* by the Administrator, June 8, 1965; *Tennessee Processing Co., Inc.*, Dec. of Hearing Examiner, PC-790, Sept. 28, 1965).

29 C.F.R. § 4.187(e)(1)(Emphasis added). A surety may be liable up to the amount of its bond.

29 C.F.R. § 4.187(g).

The regulations specify that “[D]eterminations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in part 785 of this title . . . In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to do work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer’s premises or to be at a prescribed workplace.” 29 C.F.R. § 4.178.

29 C.F.R. Part 785-Hours Worked, contains the following general rules regarding “on-duty” and “off-duty” times, short breaks, meal times, and waiting periods:

29 C.F.R. § 785.14 Waiting Time- General. Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves “scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the facts and circumstances. Facts may show that the employee was engaged to wait or they may show he waited to be engaged. (*Skidmore v. Swift*, 323 U.S. 134 (1944)). . . (Emphasis added).

29 C.F.R. § 785.15 On duty. Periods usually of short duration and unpredictable, where the employee is unable to use the time effectively for his own purposes, is considered on-duty time. Waiting in such cases is integral to the job and the time belongs to and is controlled by the employer. (Emphasis added; citations omitted).

29 C.F.R. § 785.16- Off duty. (a) *General*. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. . . (Emphasis added).

29 C.F.R. § 785.16(b) sets forth specific examples involving truck drivers. It distinguishes cases where waiting is an integral part of the job, i.e., waiting for goods to be loaded or caring for employer’s property while awaiting a return trip, which is “on-duty” time (the driver is engaged to wait) and cases where a driver is waiting to be engaged, i.e., a 6-hour layover in Washington D.C. where he is completely and specifically relieved, which is “off-duty” time. The section cites: *Skidmore v. Swift*, 323 U.S. 134 (1944); *Walling v. Dunbar Transfers & Storage*, 3 W.H. Cases 284, 7 Labor Cases para. 61,565 (W.D. Tenn. 1943); *Gifford v. Chapman*, 6 W.H. Cases 806, 12 Labor Cases para. 63,661 (W.D. Okla. 1947); *Thompson v. Daugherty*, 40 Supp. 279 (Md. 1941).

Other pertinent regulations provide that rests periods of 5-20 minute duration (which are common in industry) are usually hours worked and are paid (29 C.F.R. § 785.18), bona fide meal times (where the employee is “completely relieved from duty” and not required to perform any duties, “active or passive”) are not work time (29 C.F.R. § 785.19), and “preparatory activities” are regarded as work and are compensable (29 C.F.R. § 785.24). Travel away from home community-“ is clearly work time when it cuts across the employee’s workday.” 29 C.F.R. § 785.39. Finally, one required to be on duty less than 24 hours, even though permitted to sleep or engage in other personal activities when not busy, is working. 29 C.F.R. § 785.21(Less than 24-hour duty).

Transportation Regulations

Since truck drivers and motor carriers, such as RTC, are also governed by regulations issued by the Department of Transportation (“DOT”), under 49 C.F.R. Part 395, any decision issued without discussing those regulations would be incomplete.⁵ Moreover, the RTC contract itself, paragraph 5, requires such compliance. (PX 13).

49 C.F.R. 395.1(j) defines “travel time” as:

When a driver at the direction of the motor carrier is traveling, but not driving or assuming any other responsibility to the carrier, such time shall be counted as on-duty time unless the driver is afforded at least 8 consecutive hours off duty when arriving at destination, in which case he shall be considered off duty for the entire period.

49 C.F.R. 395.2 sets forth the following DOT definitions:

“Driving time” means all time spent at the driving controls of a commercial vehicle in operation. “On-duty” time means all time from when a driver begins work or is required to be in readiness to work until the driver is relieved from work and all responsibility for performing work. On duty time shall include:

- (1) All time at a plant, terminal, facility, or other property of a motor carrier or shipper, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;
- (2) All time inspecting, servicing, or conditioning any commercial motor vehicle at any time;
- (3) All driving time. . .;
- (4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;

⁵ Admittedly, the DOT’s jurisdiction is limited to “overseeing the safe operation of motor vehicle in interstate commerce.” 48 Am. Jur. 2d Labor and Labor Relations § 4136 (1994). However, if the two sets of regulations, i.e., DOL and DOT, can be reconciled, they should be.

- (5) All time loading or unloading. . . attending. . . or remaining in readiness to operate a commercial motor vehicle;
- (6) (Repairs)
- (7) (Drug tests)
- (8) Performing any other work in the capacity, employ, or service of a motor carrier; and,
- (9)

49 C.F.R. 395.3 regulates maximum driving time. It states:

- (a). . . no motor carrier shall permit or require and driver. . .to drive (1) More than 10 hours following 8 consecutive hours off duty. . .

Finally, 49 C.F.R. § 395.8, requires motor carrier to have drivers record, in a log or automatic recording device, their duty status, i.e., off-duty, on-duty, driving, on-duty not driving, or sleeper berth, and the location where each change in status occurred.

Debarment

The rules regarding debarment are set forth in 29 C.F.R. § 4.188. It provides:

Ineligibility for further contracts when violations occur.

- (a) . . . any person or firm found by the Secretary . . . to have violated the Act shall be declared ineligible to receive further Federal contracts unless the Secretary recommends otherwise because of unusual circumstances.

- (b)(1) The term unusual circumstances is not defined in the Act. . . The violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction. (Emphasis added).

What does and does not constitute “unusual circumstances” is illustrated in 29 C.F.R. 4.188(b)(1)-(6). “Unusual circumstances” does not include negligent or willful disregard of legal requirements or ignorance. It may include whether a bona fide legal issue of doubtful certainty was involved.

Law Related to the U.S. Postal Service

The USPS may establish mail routes and authorize mail transportation services. 39 U.S.C. § 5203. This same section provides that carriers shall transport the mail “in the manner, under the conditions, and with the services prescribed by the Postal Service” and receive compensation therefore, as well as, transport it “with due speed. . . as the Postal Service directs. . .” I have found no regulation or statutory authority regarding the duty of mail carriers to safeguard the mail.

Case Law

Skidmore v. Swift, 323 U.S. 134 (1944), is the seminal case dealing with the determination whether waiting time constitutes compensable work time. *Skidmore* involved compensability of overnight stays by fire fighters “on-call” at the Swift plant’s fire hall. The mens’ night duties and time was spent as most fire fighters do today, i.e., eating, sleeping, and otherwise entertaining themselves. If they responded to a fire, they were paid extra for the hour or so involved and were also paid for their day shifts. Relying on the similar *Armour* case, the Court found no principal of law precluding waiting time from being compensable. *Armour & Co. v. Wantock*, 323 U.S. 126, 65 S.Ct. 165(1944).⁶

The Court wrote, in *Armour*:

Of course an employer, if he chooses, may hire a man to do nothing, or to do nothing but wait for something to happen. Refraining from other activity often is a factor of instant readiness to serve, and idleness plays a part in all employments in a stand-by capacity. Readiness to serve may be hired, quite as much as service itself, and time spent lying in wait for threats to the safety of the employer's property may be treated by the parties as a benefit to the employer. Whether time is spent predominantly for the employer’s benefit or for the employee’s is a question dependent upon all the circumstances of the case. . .

That inactive duty may be duty nonetheless is not a new principal invented for application to this Act. . . We think the Labor Standards Act does not exclude as working time periods contracted for and spent on duty in the circumstances disclosed here, merely because the nature of the duty left time hanging heavy on the employees’ hands and because the employer and employee cooperated in trying to make the confinement and idleness incident to it more tolerable. Certainly they were competent to agree, expressly or by implication, that an employee could resort to amusements provided by the employer without a violation of his agreement or a departure from his duty. Both courts below having concurred in finding that under the circumstances and the arrangements between the parties the time so spent was working time, we therefore affirm. (Emphasis added).

In *Skidmore*, the parties had sought a clear all-in or all-out rule regarding compensability of inactive, on-call time, but the FLSA Administrator opposed it. The Court, citing *Walling v. Jacksonville Paper*, 317 U.S. 564, 572 (1943)(dealing with the sole issue of the extent of FLSA

⁶ The Court found the “inactive” time Armour plant firefighters spent idle or amusing themselves while on-call, over night, at the plant, was compensable working time. It wrote that whether such inactive, on-call time is working time depends on the particular facts of each case. There the firefighters began paid work at 8:00 A.M. and worked until 5:00 P.M. At that time they went on call until 8:00 A.M. the following morning at which time they were off for 24 hours then started the schedule again. They were required to stay at the fire house but had essentially no work to do. The Court considered industry practice.

jurisdiction)⁷, stated, “[W]e have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court.” The Court added, “[T]he law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.” Although it suggested the eating and sleeping times were not compensable and the remainder of the on-call time might be, the Court did not decide whether the “on-call” was compensable, but remanded the matter for a determination.

The Supreme Court’s language, leaving such issues a factual determination on a case by case basis, has understandably been perpetuated by the DOL to approach the issue in a piece meal, case-by-case basis since then. This piece meal approach is somewhat lamentable for it perpetuates uncertainty for both industry in compliance and for the government in enforcing the FLSA. At least one U.S. District Court has observed, “[T]he cases in this area articulate several tests and the law is not completely consistent in following any of these.” *Brock v. Claridge Hotel & Casino*, 664 F. Supp. 899, 29 Wage & Hour Cas. (BNA) 577, 107 Lab. Cas. P 34,991 (U.S. D.C. Sept. 19, 1986).⁸

In the past fifty-eight years, since *Skidmore* and *Armour*, various industries, among them the transportation industry, particularly motor carriers, have become increasingly regulated by the government. While I recognize not all employee compensation situations involving “waiting time” can be easily dealt with by one rule, it is time to reconcile the rules from the various regulators and provide at least this one industry firm guidance. In fact, as more fully discussed herein, the courts have been trying to do just that.

“Work” has been defined as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and necessarily and primarily for the benefit of the employer.” *United Transportation Union Local v. Albuquerque*, 178 F.3d 1109 ((10th Cir. 1999)(citations omitted)(involving city bus drivers’ non-compensable times between split shifts). The court observed, “[T]he test for whether an employee’s time constitutes working time is whether the time is spent predominantly for the employer’s benefit or for the employee’s.” *Albuquerque*, 178 F.3d 1109, 1116 (Citations omitted). Referring to DOL’s regulations, 29 C.F.R. § 785.15 and 785.16(a), it added, “An employee is on duty, is engaged to wait, where ‘waiting’ is an integral part of the job. . . . On the other hand, an employee is off-duty, is waiting to be engaged, where he is ‘completely relieved from duty’ and where the time period is ‘long

⁷ In *Walling*, the Court wrote that the applicability of the FLSA is dependent upon the character of the employee’s work and that depends upon the special facts pertaining to the particular business.

⁸ The court found one legitimate meal period. The fact employees chose to eat during non-meal breaks primarily for the employer’s benefit did not convert the short rest breaks into bona fide meal periods.

enough' to enable him to use the time effectively for his own purposes.”⁹

In *Marti v. Grey Eagle Distributors, Inc.*, 937 F.Supp. 845 (E.D. Missouri 1996).**(D cites)**, the night-loader employees of the beer distributor worked 9.5 hours with two hours of breaks, one 1-hour meal break and two ½ hour breaks, when they were completely free to do whatever they wished, but restricted to the premises. Their break room was fully equipped with entertainment equipment, telephones, and food preparation equipment. The court held the breaks were not compensable. The district court stated:

The Secretary of Labor has recognized that breaks of short duration, five (5) to twenty (20) minutes, are generally viewed as “rest periods” and are compensable. 29 C.F.R. §§ 785.18. However, breaks of longer duration “during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked” and thus, not compensable work time. 29 C.F.R. §§ 785.16. As previously noted in the Court’s February 2, 1995 order on the issue of compensability of meal periods, the Eighth Circuit held that the “predominantly for the benefit of the employer” standard is the recognized test for determining compensability of meal periods. Court Order, filed February 2, 1996 *citing Henson v. Pulaski County Sheriff Dept.*, 6 F.3d 531, 534 (8th Cir.1993). This Court further found that this same standard was applicable to the issue of compensability of break periods. . .

Most courts have considered the compensability of meal periods, but few have considered the issue with regard to breaks. Those that have considered the issue have found that breaks of at least thirty (30) minutes were not compensable, *Donovan v. Bel-Loc Diner*, 780 F.2d 1113 (4th Cir.1985); *Dole v. Haulaway, Inc.*, 723 F.Supp. 274 (D.N.J.1989), *aff’d* 914 F.2d. 242 (2nd Cir.1990); *but see, Brock v. Claridge Hotel and Casino*, 664 F.Supp. 899 (D.N.J.1986), whereas breaks of 20 minutes or less were compensable, *Martin v. Waldbaum*, 1992 WL 314898 (E.D.N.Y.1992).

The District Court went on to say that the Eighth Circuit’s test for compensability is whether the break was predominantly for the employer’s benefit. The effect of the break, e.g., that the employees may have been more refreshed, is not the focus of the test, but rather the employee’s activities and whether those activities predominantly benefit the employer.

In *Irwin v. Clarke*, 400 F.2d 882 (9th Cir. 1969), waiting time of on-call truck drivers, employed by an oil field servicing business, who showed up before their was found not compensable. These drivers were paid only when their services were actually used sporadically.

⁹ The Court observed that “on-call” cases had been decided finding compensability or non-compensability largely based upon the restrictions placed on the employees and the amount of actual work performed versus personal pursuits during the on-call periods. *Albuquerque* at 118 n. 10.

Their 24-hour per day, seven day per week on-call duty only required them to be available by telephone. Many came of their own accord to the shop waiting around for work. Usually, the ones at the shop got the work. The appellate court upheld the trial court's holding that these men were not "hired to wait" but were "waiting to be hired." It noted that while economic compulsion, i.e., trying to get work, might be a consideration in such cases, it is not controlling.

In *Bishop v. Safeway Moving & Storage*, BSCA Case No. 92-12 (Nov. 30, 1992), the Board of Service Contract Appeals considered the issue. Shuttle drivers whose routes lasted 15 minutes during a 16-hour shift were entitled to be paid, under the SCA, for each 45-minute down period or waiting period between trips. These drivers were not relieved of duty during the waits and were engaged to wait. Thus, the time was held compensable. The Board of Service Contract Appeals found the respondent's contention that this was a bona fide legal issue of doubtful certainty without merit because simply consulting with the DOL would have resolved the issue.

There are a small number of cases discussing the law related to the specific matters in issue, i.e., mail hauling contracts and breaks or off-duty times. Many are quite old. However, in 1990, the BSCA, admitting that some earlier decisions had created confusion, noted that the *Johnson* and *Manning* cases, which are summarized herein, attempted to clarify the law. *Johnson dba Southwestern Film Service*, No. 81-SCA-1390 (ALJ Mar. 7, 1984) BSCA 81-SCA-1390 (1990) and *J.R. Manning & Manning Mail Service*, 82-SCA-136 (Sec. Labor, Sep. 28, 1990).

In *Manning*, the Secretary, through the Administrative Review Board ("ARB"), finding a "close" case, held truck drivers on mail contract route were entitled to compensation for layovers as hours worked, under FLSA. It established a three-prong test stating, "[T]hus, there are three conditions which must be met in order for layover time to be non-compensable: (1) the employee must be completely relieved from duty; (2) the employee must be definitely told in advance that he may leave the job and will not have to commence work until a definite, specified time; and, (3) the leave period involved must be long enough to enable the employee to use the time "effectively for his own purposes."" Here the 16 1/4-hour route was: 3:30 A.M.-pick up truck at employer's house in Austin, Texas; 7:30 A.M.- arrive in Kingsbury after interim pick up stops and unload mail; 4:45 P.M.-load truck and begin return run; 7:45 P.M. return truck to employer's house after unloading mail in Austin Post Office. The uncompensated 9 1/4 hour layover in Kingsbury was in issue.

In *Manning*, the Board looked at *Johnson dba Southwestern Film Service*, No. 81-SCA-1390 (ALJ Mar. 7, 1984), BSCA 81-SCA-1390 (1990), holding a 2-hour and a 4-hour layover in small, rural towns were compensable since the drivers had no opportunity to effectively use the time for themselves since they were virtually stranded and forced to "kill time". According to the Board of Service Contract Appeals, DOL, "[T]he length of a layover is not determinative, but in appropriate cases it must also be considered in light of the layover location." In *Manning* the drivers were stranded in a rural, remote, small town with little or no outside activities available. There was no opportunity for part time work there and many drivers slept their time away. Thus, they were practically restrained from leaving the area during the layover periods.

In *Thompson v. Daugherty*, 40 F.Supp. 279 (D. Md. July 26, 1941), the court considered whether a 1.75-hour waiting time between trains for a contract mail carrier truck driver, all spent in the same town, but too far to go home was compensable. He was free to sleep or read or spend the time as he wished. He was not required to be at any particular place during the hiatus and not subject to being recalled during the breaks. His shift was from 11:40 P.M. until 8:24 A.M. and his job to deliver mail to train from post office for all trains. The court found the waiting periods noncompensable.

USPS mail carriers have been found not entitled to compensation for their half-hour lunch breaks, even though they had a continuing obligation to exercise due care in securing the mail, i.e., carrying accountable items and receipts, because they were not required to perform any activities that could be characterized as substantial duty during the lunch period.¹⁰ *Hill v. U.S.*, 751 F.2d 810, 812 (6th Cir. 1984).¹¹ The Sixth Circuit stated:

Appellant's obligation to exercise due care in securing the mail in his vehicle is a duty originating before his meal period. The fact that this duty is not discharged during the meal period does not mean that this time is not his own. Nor does the limited selection of authorized lunch places render the period compensable. As long as the employee can pursue his or her mealtime adequately and comfortably, is not engaged in the performance of any substantial duties, and does not spend time predominantly for the employer's benefit, the employee is relieved of duty and is not entitled to compensation under the FLSA. . .

He is not required to exercise constant vigilance (sic) (sic); he can eat comfortably without having to check his pockets regularly or be otherwise distracted from his meal . . . Any interference with appellant's meal period for this reason would be purely *de minimis*.

In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), the Supreme Court recognized a *de minimis* rule in FLSA cases. . . Split-second absurdities are not justified by the actualities of working conditions or by the policy of the Fair Labor Standards Act. It is only when an employee is

¹⁰ The carrier had to follow an authorized route in his USPS vehicle to one of three authorized lunch facilities. They are rarely interrupted at lunch and need not keep the US mail or vehicle in sight.

¹¹ The *Hill* court referred to a Sixth Circuit case where the court addressed the compensability of meal periods under the FLSA in *F.W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir.1952). "The court held that the meal period in that case was compensable because mill workers were required by the nature of their work and their employer to pay "constant attention" to their machinery and because "[t]heir lunch periods were often interrupted by emergencies requiring immediate attention." *Id.* at 496. The Court held: So it seems to have been proven adequately that the employees did not have a free lunch period during which they could serve their own interest and do as they pleased, but that their duties and responsibilities to their employer were continued during the lunch periods. As the District Judge well said during a colloquy with counsel: "A man who has to oil machinery with a sandwich in his hand is not having a free lunch period." He made the further appropriate comment that a man who has to have his eyes glued upon the watching of grain coming down from floors above and be careful that there is no stoppage during the entire eight hours of his shift, including his lunch period, does not have a free lunch period."

required to give up a substantial measure of his time and effort that compensable working time is involved. The *de minimis* rule can doubtless be applied . . . the Ninth Circuit applied the *de minimis* rule in *Lindow v. United States*, 738 F.2d 1057 (9th Cir.1984). There the court held that employees of the United States Army Corps of Engineers were not entitled to compensation for short periods of time before their shifts began when they read and discussed the log book with the preceding shift. The court stressed that the employees were not required to come in early for this purpose and emphasized the difficulties in accounting for small and varying periods of time. Therefore, the court held the seven or eight minute periods at issue were not compensable under the FLSA.

In *Maxfield v. Marshall*, 1981 U.S. Dist. LEXIS 10087, 1981 WL 2351, 25 Wage & Hour Cas. (BNA) 293, 92 Lab. Cas. 34 (Dist. Court, Utah, March 3, 1981), there was nothing in record to support a truck driver's obligation to ensure the security of his mail truck while on a lunch break and therefore that lunch break was not compensable. But, the 2-hour or less layover periods were found too short to be used for the employee's own purposes and were found to be compensable.¹²

Finally, in *Clark v. Atlanta Newspapers, Inc.*, 366 F.Supp. 886 (N.D. Ga. 1973), the Court reiterated the three tests for compensability of off-duty periods, under the FLSA and regulations at 29 C.F.R. part 785. There a newspaper staff member was afforded two periods neither of which was compensable. One was a bona fide meal period between noon and 1:30 P.M. and the other, a break over 30 minutes between 9:30 and 10:30 A.M.. The employee was free to leave the premises to eat or conduct other personal business during both breaks. During the morning break he was completely relieved from duty and was so informed. This 30-minute-plus morning break was considered long enough for him to use the time effectively for his own purposes. The Court observed the fact that he chose to remain at his desk to answer the phone or catch up on work did not transform the non-compensable coffee break or the non-compensable lunch into hours worked.

Annotations

"Waiting periods during which employees are completely relieved from duty and which are long enough to be used effectively for the employee's own purposes are not hours worked, *Bohn v. B & B Ice & Coal Co.*, 63 F. Supp 1020 (DC Ky 1946), if the employees are told in advance that they may leave the job at a particular time and that they do not have to return to work before a specified hour. *Thompson v. Daugherty*, 40 F.Supp. 279 (DC. Md. July 26, 1941). Accordingly, periods of "free time" during which a contract mail carrier (*Thompson v. Daugherty*) and a truck driver (*Jackson v. Mid-Continent Petroleum Corp.*, 6 CCH LC P 62613 (ED Ok 1942)) were relieved of their duties were not time worked. 48A Am. Jur. 2d, Labor and Labor Relations § 4134 (1994) and Employment Coordinator, C-16,000 Overtime Pay, C-16,472 Off-

¹² The complete facts of the case are not readily available.

duty Waiting For Most Workers (2002).

The following example is set forth in the Employment Coordinator:

If a truck driver is sent from Washington, DC, to New York City, leaving at 6:00 A.M. and arriving at noon, and is completely relieved from all duty until 6:00 P.M., when he again goes on duty for the return trip, the waiting time between noon and 6:00 P.M. is not working time, since the employee is “waiting to be engaged.” (Citing 29 C.F.R. § 785.16(b)).

“The jurisdiction of the DOT Secretary is limited to overseeing the safe operation of motor vehicles in interstate commerce. . .” 48A Am. Jur. 2d, Labor and Labor Relations § 4136 (1994).

EVIDENCE

PETITIONER’S EVIDENCE

The government offered the testimony of live witnesses and the testimony of four witnesses by deposition.

Mr. Verne Waldow

Mr. Verne Waldow has been with the Department of Labor (“DOL”) for twenty-five years. He has a bachelor’s degree and is an investigator with the Wage and Hour Division. He conducted an investigation into RTC’s SCA compliance in early 1999. RTC had fourteen postal contracts with 150 drivers throughout the northeast. However, his investigation was narrowed to one contract. Mr. Waldow notified the USPS which subsequently audited all of RTC’s postal hauling contracts. The USPS provided him a spreadsheet which he used as a basis for his findings. As a result of his investigation, into contract 14424, Mr. Waldow believes RTC has two violations: not paying drivers for all hours worked and not paying all required fringe benefits.

Mr. Waldow identified PX 5 as RTC’s USPS mail hauling contract (#144242) renewal. PX 5 does not address breaks and has nothing about drivers staying with their trucks. During the investigation he met with Mr. and Mrs. Rood, Pat Packo, RTC’s payroll clerk, the lady who kept the logs and interviewed nearly all the RTC drivers at their Cranberry, PA, shop, about twenty drivers. His employee interviews included Mr. Kosto, Mr. Marangoni, and others. He also reviewed the RTC Employee handbook. Mr. Waldow checked with other USPS mail haulers with similar contracts which made direct runs without using such off-duty times. He reviewed RTC’s records and obtained RTC’s schedules for all fourteen contracts. Mr. Waldow also reviewed RTC’s wage and hour compliance history. He found one previous investigation relating to unpaid fringe benefits, in 1993, which was resolved by the payment of those benefits.

Mr. Waldow spoke with Mrs. Rood about fringe benefits, which she administers for RTC.

The problem was that payments to the plan were not being made. After she explained why, Mr. Waldow contacted the DOL pension experts. RTC's pension plan had been transferred three times, with Scudder being the newest company and payments had began. At that time the payments were okay but untimely. Subsequently, Mr. Waldow received RTC employee complaints. DOL's pension personnel informed him that under the SCA payments must be made quarterly not yearly as under ERISA. Mr. Waldow informed RTC of that.

Upon reviewing the schedules, in PX 6, provided by RTC, he observed four trips with a lot of off-duty time. Part 785 of the DOL regulations addresses "breaks". Mr. Waldow testified he asked Mr. Rood the meaning of the breaks. Mr. Rood told him drivers were off-duty during their trips to accommodate the USPS mandated arrival and departure times. The USPS had penalties for early arrivals and the drivers needed meal and safety breaks. Mr. Packo informed him the reason for the breaks was to hold the bottom-line on the amount paid by the USPS, a point Mr. Rood agreed on. Mr. Waldow spoke to several USPS personnel, i.e., Jim Bagdaddy, Pete Bocollo, and learned drivers were not free to leave the mail unattended, under the "sanctity of the mail" rule. Moreover, the drivers told him they were responsible for the security of the trucks. Mr. Waldow concluded the off-duty times were for RTC's benefit because: the USPS had no regulation regarding a straight-through trip; the reason for the breaks was to increase RTC's profitability; it was used by RTC to bid lower; and, the drivers universally said the breaks were for RTC's benefit and not their choice. Even had there been no "sanctity of the mail" issue, he believes the off-duty time was compensable because the drivers were "engaged to wait".

Most of the Cranberry drivers informed him that although they were paid for pre-trip and post-trip inspections and fueling the trucks, they nearly universally said it was not enough time to perform these tasks within the schedule. They felt they needed an additional 15 minutes. Mr. Waldow himself calculated the drivers needed an additional one half hour. He added a total of 15 additional minutes for inspections for each round trip.

The wage determination, PX 7, has wage information from the USPS. There were several revisions of the back wage calculation. RX 3, showing \$214,000 owed, represents the second set of back wage calculations. His initial calculation, showing \$400,000 owed for several contracts, was based on USPS information. The most recent amount owed is \$137,000. PX 10 covers July 1, 1997 through June 30, 2000. The first twelve pages are a summary. Mr. Waldow relied on records to prepare PX 10. Calculations are based on what the drivers informed him per their drivers' logs which reflected the number of trips. Admittedly, sometimes drivers had been paid for off-duty times and they were paid for pre-trip inspections. For 1997, he used RTC logs and PX 12 from the USPS. He relied on RTC weekly time cards beginning in January 1, 1998. He did not check driver logs against their time cards, but did examine the time cards. (RX 5-8). He did not include "extra" trips in his calculations. Moreover, the SCA provides fringe benefits must be paid only for the first 40 hours per week of work and most drivers worked more than that. So, the calculations did not include fringe benefits for the hours over forty. He allowed a ½ hour deduction for lunch. Moreover his calculations only included the two "off-duty" breaks of one hour and five-minute duration. He also added 15 minutes for pre-trip inspections.

Mr. Waldow went over page 14 of PX 10. One column has the date of the trip taken from either PX 11 or PX 12. Another column has the unpaid hours amounting to 1.21 hours. This was calculated because each trip had two 1.05 hour breaks totaling 130 minutes. 15 minutes were added for unpaid pre-trip inspection times bring the total to 145 minutes. This 145 minutes was divided by two trips to show 72.5 minutes, or 1.21 hours, unpaid per trip. The unpaid hours were multiplied by the \$14.41 wage rate to reach \$17.44 unpaid per trip.

Mr. Waldow informed RTC to comply, they needed to add 15 minutes for inspections and either pay for the off-duty times or not have them. He recommended debarment because, under the SCA criteria, the violations were on-going, RTC refused to comply in the future, RTC refused to pay the back wages owed, and it was not presently in compliance. Since 100% of RTC's business is with the USPS, debarment would put RTC out of business. RTC was not unwilling to work with him and his recommendation was not premised on any non-cooperation by RTC.

Mr. Waldow provided additional testimony at the continuation of the hearing, primarily about his "re-calculation" of the back wages and fringe benefits due as set forth in JX 5. He explained the new calculations were more accurate and took into account RTC's input concerning the driver exception reports Mr. Packo asserted they had paid. JX 5A was more precise in that it more accurately identified drivers who had run the routes in question than earlier compilations had. Since the parties agreed on the amount of back wages due, if a violation was found, it is not necessary to go into the entirety of Mr. Waldow's follow-on testimony. However, the parties continued to dispute the computations for pre-trip and post-trip inspections. Thus, Mr. Waldow's testimony about that warrants discussion.

Prior to the second hearing, RTC's Mr. Packo and Mr. Waldow discussed DOL's computations. Mr. Waldow had a 7,000-item data base of data relating to RTC. In JX 5C, pages 14-15, Mr. Waldow included adjustments submitted by RTC to the calculations he had made earlier, giving RTC credit for payments it had made, taking Mr. Packo's word for it. The total credit was \$3,973.32. Additionally, Mr. Waldow temporarily included an "unknown" driver, in JX 5A, page 5, to cover funds owed to a yet confirmed driver, involved in about 800 trips. That driver is probably Mr. Leathersich, who had been listed. The entire adjustment was applicable to periods for which RTC had paid drivers who had filed exception reports for taking more than the scheduled times.

Mr. Waldow found RTC owed \$26,322.80 for the additional time drivers had required to conduct inspections beyond the scheduled time both pre-trip and post-trip. Based upon his investigation, he had determined that each driver had required an additional 15 minutes, beyond the scheduled times, to conduct the inspections. Thus, he multiplied the number of trips, i.e., detail records on JX 5, times the 1/4 hour and the wage and fringe information to reach a "total" owed for "pre/post Amt" column.

Mr. Joseph Arsenault

Mr. Joseph Arsenault has worked twenty-four years with the USPS. He has supervised contracts since 1994. He signed USPS contract 14424 with RTC as the contracting officer. RTC's contract goes back to 1992. It was renewed on July 1, 2001. RTC has been a "quality performer" since 1992. Section 4, page 2, of the contract contains the standard highway contract "sanctity of the mail" clause requiring handling with "certainty, celerity and security." "Security" refers to water-proofing, locked trucks, etc. "Celerity" refers to speedy delivery.

He examined PX 6, not a USPS document, and testified the USPS does not require such off-duty times en route. He examined RTC's Employee handbook. According to Mr. Arsenault, the USPS does not agree that drivers are "completely relieved" because of the "sanctity of the mail" clause. Until he read the Handbook's "break" clause, he had no idea RTC was violating the contract. The Handbook language is inconsistent with the intent of the contract, but admittedly may be an issue. Admittedly, there is no exact wording that drivers shall remain with the truck. Leaving the mail unattended would not be well received by the USPS. The consequences of doing so might be route termination. The USPS communicated frequently with RTC. He does not know if any postal employee told the drivers to remain with the trucks. It is understood that the mail should always be within view. Moreover, the USPS would not condone drivers using trailers for personal errands, as that would violate the sanctity of the mail clause.

It was his opinion that including off-duty times in the route schedule would be to RTC's financial advantage. The USPS recently re-examined route 804, which is 275 miles long, at both the

old and new speed limits. With the new, higher speeds, the USPS could reduce the time to 5 ½ hours. The review revealed the unpaid hours saves about \$81,000 a year for RTC and the new tolls costs RTC about \$53,000 a year, resulting in a net savings to RTC of about \$28,000 a year.

In formulating contracts, speed limits and breaks are taken into account by the USPS. It is not illegal to include breaks. Looking at PX 6, he observed the USPS had not anticipated the breaks for these routes, under the old speed limits. In 1992, the NY Thruway speed limit was 55 mph similar to the non-toll roads.¹³ Thus, under this contract the USPS did not require the use of toll roads as it did not wish to pay for the tolls. It appears RTC now uses toll roads which affords time for off-duty periods. He opined it might be cheaper for RTC to pay tolls versus the labor cost. When the USPS renews this contract again there will be a lower contract rate based upon NY Thruway speeds.

PX 5, page 5, is a USPS document setting arrival and departure times. The USPS tracks arrival and departure times. If RTC did not adhere to these times, it could either help or hurt the USPS, i.e., by making mail late. The USPS could not properly operate without arrival and departure times. They are used to keep order. He explained every class of mail is subject to an

¹³ The contract was designed to be run at an average of 46 mph.

operating plan. For example, on route 803, if RTC did not have the off-duty time and the driver arrived in Pittsburgh early, it would be to the USPS advantage, i.e., getting the mail early. Arriving early is not generally a problem, but might be dependant upon the facilities operations plan. Late arrival is a problem because it "squeezes" USPS processing. He explained at the BMC, trucks are queued in the yard rather than taken to a dock.

Mr. Arsenault testified if mail was left unattended under contract 015, it was wrong. As far as route 810-807, it is not the USPS position that RTC should pay the drivers 13 hours and 45 minutes.

Mr. Norman Dzikowski

Mr. Norman Dzikowski has worked for RTC for six years as a truck driver. He primarily drove the route between Rochester, New York, and Pittsburgh, Pennsylvania, under USPS contract 14424. He currently drives route 804-805. (TR 89). He also drives the relay routes 801 and 802 twice a month. (PX 6).

Mr. Dzikowski drove route 807- 810 in March 1999. His (scheduled) report time at the Cranberry, Pennsylvania, RTC shop was 2:30 P.M., but he actually came in at 2:10-2:15 P.M.. At that time, he would pre-check his tractor, i.e., check the oil, lights, and tires. He would then drive to the USPS Bulk Mail Facility ("BMC") in Cranberry to pick up his load. It would take him about a quarter to half an hour to drive to the BMC from the shop, a two-mile trip. At the time there was a lot of traffic, and store traffic, as well as construction. After getting his "ticket" from the USPS (dispatcher) he would pre-check the trailer. He would depart the BMC at 3:00 P.M. as scheduled.

At 6:00 P.M., Mr. Dzikowski would go "off-duty" as scheduled. He did not always arrive at the exact off-duty time. For his off-duty locale, he had two choices, a truck stop in Erie, PA, or Silver Creek, Exit 58, which had a small truck stop. However, he was never told he had to stop there. During the one hour and five minute scheduled off-duty time he would kill time by eating and completing his driver's log. He would park his tractor-trailer in such a way the trailer's back door would be visible to the public, for security purposes. It is possible the truck was not always in his sight. The USPS secures the trailer with a red seal with an affixed serial number. That serial number is also listed on three forms. If the weather was bad, he would drive through his break and get paid for doing so. Otherwise, he would then go back on-duty (as scheduled) at 7:05 P.M. and drive to Rochester, arriving at 9:00 P.M. (as scheduled). At 9:10 P.M., he would go off-duty (as scheduled) and go to the cafeteria. During the forty- minute scheduled off-duty period (9:10-9:50 P.M.), he would complete his (driver's) log, read the news, and eat. At 9:50 P.M., he would go to the USPS expeditor's's office to get his ticket for the return trip. He departed the USPS Rochester facility (as scheduled) at 10:00 P.M.. His next stop was scheduled for 1:00 A.M.. On re-direct examination, he called himself the "book man" (working exactly to the job requirements). During his 1:05 hour break he would not leave the truck; there was nothing he did or could do. He admitted, however, he would have been able to buy a Valentine's Day card for his wife during the break had he so desired.

Mr. Dzikowski would take his 1:00 A.M., one hour and five minute, off-duty time at either a BP station or at the Indian Reservation. He did not eat at each of his three scheduled off-duty periods.

The Indian Reservation had a little restaurant and he could buy cigarettes there. He would leave at 2:05 A.M. (As scheduled) and drive to the USPS Pittsburgh BMC at 4:00 A.M. (As scheduled). At the BMC, he would pull up to the gate, drop his ticket off at the window, get instructions where to park, but did not perform a post-trip inspection then. He then returned to the RTC Cranberry shop and park. Some one else, Randy, fueled the tractors at that time. Currently, the drivers fuel their trucks and get paid an extra ten minutes for doing so. In March of 1999, he was paid ten hours and fifty five minutes for the route, which actually took over thirteen hours.

Mr. Dzikowski started driving route 804-805 in June 2001. (The schedule differs from that in existence earlier). He reported at 9:45 A.M. (as scheduled). He departed the Pittsburgh USPS BMC at 10:15 A.M. (as scheduled). He went off-duty at 1:10 P.M. for a scheduled fifty minute break until 2:00 P.M. (as currently scheduled). He arrived at the Rochester General Mail Facility ("GMF") at 4:00 P.M. and went off-duty at 4:10 P.M.. He reported back on-duty at 5:40 P.M. (as scheduled) and left Rochester at 5:50 P.M. (as scheduled). As of June 2001, there is no scheduled off-duty time on the return trip to the Pittsburgh BMC. He now completes the route at 12:10 A.M. and gets paid for eleven hours and ten minutes the same amount of hours as under the old schedule.

Mr. Dzikowski testified his hourly wage was \$14.41 with \$1.42 in pension benefits and \$0.96 for hospitalization. He now is paid \$16.41 with pension and hospitalization benefits. He never checks his pension account. Mr. Dzikowski testified he has never lost a truck or mail. RTC never told him to stay with the truck.

If he had had a choice on how to schedule route 810-807, Mr. Dzikowski would have preferred to take only a one-hour break for safety instead of all the breaks contained in the schedule. If it was up to him, he would not drive the 804-805 trip as scheduled. He would take a half hour break on his way to Rochester and a half hour break on the return. As it is (804-805) the breaks are for RTC's convenience.

Mr. Dzikowski testified about PX 8. He recorded his actual times on his log. He felt he gave RTC four and one-half years worth of free time on the scheduled route. Mr. Dzikowski testified about PX 9. Before Mr. Rood added fifteen minutes to the schedule he was not paid for showing up early. He reflected his start time in his log when he got in the truck. He felt that he had not been completely relieved on his breaks (off-duty time) because, "I am responsible for the truck even if I was reading, eating, etc.. It's common sense. I never left the truck and was not really free to leave." If the truck had broken down (en-route) he would have remained with it. A background check had been conducted before he was able to drive under this contract.

On cross-examination, Mr. Dzikowski explained that with his seniority he can and has bid on the routes he drives. He used to report 15 minutes early, but no longer does. He had not

submitted "exception" reports for those 15 minutes periods. However, he did get paid for all the exception reports he submitted. He did not inspect the tractor and trailer at the same time because he would pick up the trailer at the BMC. He testified they are now paid for traffic delays, but was not paid for them before 1999. On the routes, he passed by various truck plazas and could have stopped at them had he wanted to. He occasionally called his wife while on breaks. No one at RTC ever told him to stay with the mail. He had never seen the USPS-RTC contract. He did not pay the highway tolls (RTC did). DOT regulations require insurance and RTC pays for that. RTC would pay for breakdowns.

Mr. Raymond Kosto

Mr. Kosto began working as a driver for RTC on February 12, 1996. He had previously worked for Eagle Express also hauling mail. Before Pat Packo, Andy was his supervisor. His job duties included driving, pre-trip and post-trip inspections, picking up mail at the BMC, and delivering it. The Pittsburgh-Harrisburg route was his primary one. Mr. Kosto added he had an "illegal" 3:00 AM run, three to four time per week, during the period he was to have been resting for that route. He drove the Pittsburgh-Rochester route, 810-807, about three to four time per week.

Mr. Kosto believes he was fired by RTC for his union organizing activities, i.e. distributing union pamphlets. He denies having kept drivers from their routes, as RTC had alleged. Four fired RTC drivers had a hearing and won money damages. RTC is now a postal union shop, the APW Union.

Mr. Kosto drove the 810-807 route in March of 1999. His hourly pay was \$14.41 with \$1.42 in pension funds and \$0.96 in medical benefits. He was paid these fringe benefits when he left RTC. The basis of his driving pay was the log he sent to RTC's office. Mr. Kosto testified he had never filed an exception report, but admitted on cross-examination that he had done so for postal delays and time to fuel a truck. He would turn in his time cards, consistent with his driver's log, every two weeks to get paid.

Mr. Kosto testified he would report to RTC at 2:30 PM (as scheduled). Although not told to do so, he used to report earlier, but ceased that after the union came in. It was a 20-25 minute drive from RTC to the BMC Pittsburgh. He would leave the BMC Pittsburgh at about 3:15 P.M. making up the 15 minutes off schedule by driving faster. At 6:00 P.M. he was off-duty according to Mr. Packo and the schedule. He would pull over and stop at 6:00 P.M. for 1:05 and prepare his logs and do cross-word puzzles. He was back on-duty at 7:05 P.M., as scheduled. He would arrive at the USPS Rochester at 9:00 P.M., as scheduled. Then, at 9:10 P.M., he took the scheduled 40-minute break at the Post Office. At 1:00 A.M. he was again off-duty for 1:05 and worked on his log and cross-word puzzles. At 2:05 A.M. he resumed driving and arrived at the Pittsburgh BMC at 4:00 A.M., as scheduled. There, he dropped off the USPS paperwork and the mail. He would then return to the RTC shop, in Cranberry, fuel the truck and leave, finishing, as scheduled at 4:15 A.M. His post-trip inspection included checking the tires and stuff. He was paid for the time spent on vehicle inspections.

Mr. Kosto's off-duty stops depended on where he was at a given time. RTC never told him to take his off-duty times at any particular location. He often passed by potential stops to stay on schedule. However, he had never heard of any driver getting in trouble for taking a break not in accordance with the schedule. Exit 57-58 had a rest area. He rarely left the turnpike. The New York freeway had one truck stop he could have used. New York law proscribes leaving large vehicles on the side of the road. He would complete his log book, make cell-phone calls and do cross-word puzzles at the rest stops. Usually, he ate at the Post Offices.

In his twelve and one half years hauling mail, he was never allowed to leave the mail (unattended). Eagle's schedules for similar trips to some of the same locals were not similar to RTC's and had no lengthy breaks. Although RTC never told the drivers to stay with the mail, Mr. Kosto testified the drivers were never told they could leave until Mr. Rood began having trouble with DOL. At the time, Mr. Kosto stated, based on his experience, drivers could not let the trucks out of their sight. But, he had never seen anything in writing from the USPS requiring drivers to stay with the mail. Nevertheless, he kept the mail in sight except for short bathroom breaks.

Mr. Kosto testified about PX 8, page 2, his February 1996 RTC Employee Handbook, which did not say drivers were "completely relieved" during their off-duty time. He had not considered himself free (during the off-duty periods). RTC's "breakdown" policy was to call in but remain with the mail. Mr. Kosto would record the scheduled times for the trip instead of the actual times.

At some point, Mr. Kosto checked his pension contribution and found they were not being made by RTC twice monthly as required. He believes the "un-needed" off-duty times were constructed for RTC's benefit, not the drivers. He would have preferred driving the route directly through without breaks. He had also driven 804-805. He now again works for Eagle.

Mr. William Gaertner

Mr. William Gaertner began working as a mail-haul driver at RTC in 1998. He had previously worked for other trucking companies. He drove the 810-807 route, the 804-805 route and the 802 route about twice a month. In 1999, he primarily drove the 804-805 route.

Mr. Gaertner testified he would report about ten minutes early for the 804-805 route because of road construction and traffic conditions. Upon arrival at RTC's shop, he would install his CB radio and inspect his truck. His pre-trip inspection took about ten to fifteen minutes. Then he drove, ten to twelve minutes, to the Pittsburgh BMC to pick up a trailer. Mr. Packo had warned him not to leave the RTC yard early. Upon arriving at the BMC, he would meet the USPS expeditor's who would give him a trip ticket. He then attached the trailer. Sometimes he left the BMC earlier or later. If he ran late, he would make up the time on his break.

Mr. Gaertner went off-duty at 1:00 P.M. (as scheduled), usually at the Irving-Silver Creek Indian reservation or the Angola Plaza, which had food facilities. He would catch up on his driver

log and pay sheets, write checks for bills, and ate his bring-along food in the truck. He normally ate on his first break, but sometimes did on the second break. At 2:05 P.M., he would leave, as scheduled, arriving in Rochester at 4:15 P.M., as scheduled. He went off-duty at 4:25 P.M., as scheduled. At 5:40 P.M., he would report, as scheduled, and depart Rochester at 5:50 P.M., as scheduled. He went off-duty at 9:00 P.M., as scheduled, normally at the "top" of I-79. During this break he would usually "kill time" listening to the radio. He went back on duty at 10:05 P.M., as scheduled, and arrive at the Pittsburgh BMC at 11:50 P.M., as scheduled. He completed his work by 12:20 A.M.. He was paid for eleven hours and ten minutes on the 804-805 route.

Mr. Gaertner testified he completed two copies of his driver's log and submitted a time card every two weeks. He recorded his exact time on his time card, but if he arrived early, he reported the scheduled time. Bill Stambaugh of RTC had told the drivers to do so at a meeting of drivers. The RTC time cards must be within 15 minutes of the DOT logs, which do not allow for recording the exact minutes.

Mr. Gaertner identified the RTC Drivers' handbook. He did not consider himself completely relieved during the off-duty times because he felt responsible for the truck and its contents. He was told he was responsible for the truck, "it's in the USPS regulations (and RTC's contract)." The USPS expeditor's, John, had told him of the requirement to keep the truck in sight and that if the USPS seal was broken he would be responsible. No one at RTC told him to stay with his truck or where he had to stop for breaks. The drivers had a 15-minute "leeway" over where they could stop for breaks. There were no truck stops on I-79, but three on I-90 where he could stop. He never left the truck, never ran errands, and never left to meet anyone during the breaks. During his third break, he would normally rest over the steering wheel. Sometimes, on the breaks he would do bills or call home. He admitted he could have purchased a birthday card and occasionally bought a newspaper. At the Angola stop, he stayed with the truck because one would have to walk across a bridge (to use the facilities).

If he had had a choice, Mr. Gaertner would have preferred to run straight down (to Rochester, NY) and back (to Pittsburgh, PA). The off-duty times were included for RTC's convenience, not the drivers'. In fact, when he did extra trips for this route, he was paid for the same number of hours, but was not required to take the breaks. Sometimes, he would take a half-hour break on these extra trips.

Mr. Gaertner testified he had called Scudder about RTC's pension contributions and learned it was thirteen months behind in contributions. Although he received benefit statements from RTC monthly, the amounts had not been contributed. He had not become eligible for pension benefits until 1999 and RTC's contributions were timely then.

Mr. Wilson Montalvo

Mr. Wilson Montalvo testified he now works for Trumpco Timber. Two years earlier he had worked as a mail-haul driver for RTC, between 1993 and 2000. RTC fired him for a non-duty related ticket he erroneously was issued for a suspended license. Although he had been

involved in union organizing, he did not believe RTC fired him for that. He had previously worked hauling mail for E-Mac Transportation. Pat Packo was his supervisor at RTC. He had spoken with the DOL investigator, Mr. Waldow, about a year ago about not being paid for the off-duty times. (PX 3, p. 48).

Other mail-haul drivers, i.e., Midwest, Eagle, said they were being paid. (PX 3, p. 49).

Admittedly, he is not familiar with the USPS contract terms. (PX 3, p. 50).

Mr. Montalvo regularly drove the 804-805, Cranberry, PA, to Rochester, NY, route and occasionally the 802-804 relay to Exit 7. For the 804-805 route, he would report at 9:45 A.M., as scheduled, and inspect his tractor. Then he would drive to the Pittsburgh BMC to pick up a mail trailer. He then returned to the RTC shop to take his (first) off-duty time. When Packo became his supervisor, he was required to take the breaks as scheduled. He would leave the Pittsburgh BMC at 10:15 A.M., as scheduled. The first off-duty time was scheduled for 1:00 P.M. through 2:05 P.M. He would take the break at the Erie line or at a truck stop with a Shell Station, at Exit 7. He would do paperwork during the off-duty time. If he needed to use the bathroom, he would keep the truck in sight. He would arrive in Rochester at 4:15 P.M., as scheduled, and deliver the trailer to the USPS. At 4:25 P.M. he was again scheduled off-duty, but would unhook his trailer then dine and do paperwork. At 5:40 P.M., he reported to the USPS dispatcher for his paperwork and "sealed" trailer. He was off-duty at 9:00 P.M. and would stop at a truck stop for coffee. During the break he would chat with the attendant, but do no personal business. He would arrive at the Pittsburgh BMC at 11:50 P.M., as scheduled. He was "pretty much" finished by 12:20 A.M., as scheduled, and would go home without performing any post-trip inspection. Mr. Montalvo may have occasionally driven through the break times in bad weather or if there had been a breakdown. RTC never told him not to apply to be paid for the time he actually worked.

Mr. Montalvo testified he was told his DOT log book and the RTC time card must match. Mr. Packo told him his log book should match RTC's schedule. If the time card and driver's log did not match, Mr. Packo would return them to him. Mr. Montalvo had to follow Packo's rules or not get paid. He recorded his meals and breaks as such. He identified the RTC Employee Handbook (PX 8). He did not believe he was completely relieved of duty, during the off-duty times, because he had to stay with the trailer. Both his RTC supervisors Mr. Packo and Randy, as well as the USPS told him he must stay with the trailer. He never left the truck nor did anything. On cross-examination, he admitted on the Utica-Syracuse route, he had left his mail trailer and gone home during a break. Mr. Montalvo testified he could stop anywhere he wanted en route, but it was limited to en route. But, with a one hour and five minute break there was really no where to go with an 18-wheeler; he could not go home. "What would I do?" He admitted, on cross-examination, that during the breaks he could read, do bills, or make calls. He believes the breaks were for the employer's convenience. He would have preferred to take a half hour break each way. Route 804-805 takes thirteen hours. His prior employer, E-Mac, did not have mandatory breaks like RTC's.

Larry Marangoni

Larry Marangoni testified, under oath, at a deposition on November 15, 2001. (PX 3). He has worked as a driver at RTC since March 19, 1995. He had previously owned his own trucking company for fourteen years, but had never had a USPS contract. He has been a member of the American Postal Workers' Union ("APWU") since February 2001. Pat Packo, who reports to Mr. Rood, is his supervisor. Several Rood family members are employed at RTC. (PX 3, p. 10). Dick Powell is in charge of safety and Andy is the night dispatcher.

Mr. Marangoni's job at RTC has always been to drive mail from Rochester to Pittsburgh. His current rate of pay is \$16.04 per hour, but was \$14 and change in 1998. He works an average of at least 40 hours a week and frequently more. (PX 3, p. 62). His fringe benefits are about \$1.44 per hour for health and \$1.60 per hour for the pension. He checked on-line for the status of his pension about every two months. Mr. Rood told the drivers, at a meeting, RTC would contribute once a year and has stuck to that. (PX 3, p. 47). He gets two weeks yearly vacation and now gets holidays off. (PX 3, p. 62).

Mr. Marangoni testified he drove the 801 and 809-808 routes. (PX 3). The 801 runs from Rochester, leaving at 1:30 A.M. to Erie, PA, and switches trucks with the 802 run from Pittsburgh, PA, and each then returns to their point of origin. (PX 3, p. 14). The 809-808 trip is a complete trip from Rochester to Pittsburgh and back. He does the 801 trip twice per month and the rest of the time he drives the 809-808 trip. He is on a two-on/two-off schedule, but once a month he has this 801 trip. That is he runs two 809-808 trips then has two days off for a two-week period. The next two-week period, he has two 809-808 trips and then one 801 trip. Then he has a day off, then goes back to two 809's and has two days. Before his current schedule, RTC had a relay. They did not have one to Pittsburgh because of the 55 mph speed limit, which prohibited a round trip since it could not be completed in ten hours. Thus, they relayed from Rochester to Ripley, NY, and back. (PX 3, p. 15). They did not have round trips. That changed in about 1997 when the speed limit increased to 65 mph. RTC has used the current schedule since 1998.

Mr. Marangoni described the 809-808 trip. He said the schedule had changed since 1998. In 1998, he was to report to the truck, the tractor, at 2:45 P.M. in a back lot of the post office. (PX 3, p. 16). He would generally arrive half hour early so he could set up his CB and make sure the truck was clean. He called that "my own time." (PX 3, p. 17). He would then do his log book and check the paperwork, check the oil, tires and lights to ensure the truck was safe. (PX 3, p. 18). That took 15-20 minutes. It took 10 or 15 minutes to inspect the tractor and then another ten minutes the trailer. (PX 3, p. 65). Since every driver acts differently, his might have taken him 5 minutes longer. If it went beyond 3:00 P.M., he would make it up at a stop off, "giving" them the time with a shorter break. (PX 3, p. 67). RTC had not told him explicitly to do this, but did say to be on time. (PX 3, p. 70). He believed the pre-trip time was ten or fifteen minutes, but he still gets paid for 15. (PX 3, p. 67-69).

They were supposed to leave Rochester at 3:00 P.M., but usually did not. Usually, it was "easily" 3:15 P.M.. It took 1 ½ minutes to drive over to the back door to pick up the trailer, another 3-4 minutes to get the paperwork, another 3-4 minutes to find an expeditor or dispatcher,

and another minute or two to back the trailer under the truck and then do another complete inspection of the whole unit. (PX 3, pp. 18-19). Then, he would pull the truck forward, stop, check the rear lights, and check for the USPS seal. A Driver's Vehicle Inspection Report ("DVIR"), required by the DOT, is used to record the vehicle inspection. If certain defects are found, they would have to be repaired before the trip. (PX 3, pp. 20-21).

At 6:00 P.M., they had been told to pull over wherever they were. (PX 3, p. 22). Then he would pull over on the shoulder and sit for an hour and a half or an hour and five minutes, according to the schedule. (PX 3, p. 22). He usually pulled over at the same location, Ripley, NY. There is nothing at Ripley. (PX 3, p. 23). At times, he would go further, until 6:15 P.M., to hit a truck stop or rest area where he would feel safe or because of delays. (PX 3, p. 23, 52). RTC did not give him trouble for not being precise. (PX 3, p. 52). During the break, he would clean the windows, check the oil, inspect the truck, do paperwork, and sometimes eat, but always in the truck, but RTC did not require these activities. (PX 3, p. 23, 52). He testified that both RTC and the USPS told the drivers that "we were to be with the truck (at all times)." (PX 3, p. 23-24). He thought Mr. Packo told him this when he was hired and the USPS expeditor. (PX 3, p. 23-24, 52). He never left his rig unattended at Ripley, except when actually in the bathroom. (PX 3, p. 27, 53). When asked if he could have taken a break at a restaurant to eat, he testified, "I guess I'm allowed to do anything I want to, yes." (PX 3, p. 53). He would resume driving at 7:05 P.M., as scheduled, arriving at the Pittsburgh BMC at 9:00 P.M., as scheduled. (PX 3, p. 27-28). The BMC would give drivers some leeway with arrival times. So, if he was delayed five to fifteen minutes to fuel the truck, they would punch him in at 9:00 P.M.. He was not allowed to skip his break or arrive at the BMC early because of the USPS schedules. (PX 3, p. 29). Now, drivers refuel at RTC's Cranberry facility, but previously did so at a private fuel stop. He would go off-duty, as scheduled, at 9:30 P.M., at the Pittsburgh BMC. "But, we had no place to go. We had to sit right there with the truck. We were stuck in the fenced-in Post Office. Couldn't go nowhere." (PX 3, p. 30).

Mr. Marangoni described the 9:00-10:00 P.M. time at the Pittsburgh BMC. They would first drop off their trailer where the dispatcher ordered, do a quick visual post-trip inspection, park the tractor, then wait for their dispatch trailer. (PX 3, p. 32, 51, 55). The BMC has some vending machines, a pay telephone he could use and restrooms. They would get their trailers then do a pre-trip inspection and depart the Pittsburgh BMC, at about 10:00 P.M., as scheduled. (PX 3, p. 32). The next off-duty time was at 1:00 A.M. for one hour and five minutes. He tried to take that break at the state line, where he stopped coming down, the safest place for his load and himself. (PX 3, p. 33). He would do about the same thing, i.e., paperwork, read, bring coffee to the truck, sit and wait. He usually did not eat then. Generally, he would arrive in Rochester at 4:00 A.M., as scheduled. He would find a dispatcher and drop off the trailer at the assigned dock and do a quick visual post-trip inspection. (PX 3, p. 35, 51). After disconnection the trailer, it took about 15 minutes to do the paperwork and the post-trip inspection report and leave it in the truck for the next driver. (PX 3, p. 35, 51). The 11 hours, five minutes, at the bottom of the schedule is what RTC paid for.

The drivers had asked RTC for less "down time" or unpaid time. (PX 3, p. 56). The

schedule changed (somewhat) in 1998. (PX 3, p. 35). Now the arrival time at the Pittsburgh BMC is 8:45 P.M. Now at 9:30 P.M. the break is 35 minutes versus the previous 15 minutes. "Then on the way back there is no down time." (PX 3, p. 36). The arrival time in Rochester is now 2:45 A.M. versus the previous 4:00 A.M. (Eliminating the second 1:05 hour break). (PX 3, p. 36). However, now they are paid only for eleven hours versus the prior 11 hours, five minutes.

Mr. Marangoni testified that the drivers were not permitted by New York law to leave their trucks along the Thruway. (PX 3, p. 26). Thus, in the event of a breakdown, he would use his own cellphone to call RTC, which would send a repairman.

Mr. Rood told him the breaks were included to compensate RTC for running the Thruway. (PX 3, p. 37). At the time the tolls from Rochester to Buffalo were about seven dollars and another seven or eight from Buffalo to Ripley. An hour of off-duty time spares close to \$15.00 or \$16.00 in driver pay. (PX 3, p. 38). It was Mr. Marangoni's understanding RTC was paid for the downtime hour by the USPS, but did not compensate the drivers for it. (PX 3, p. 38).

According to Mr. Marangoni, drivers would not be able to keep the schedule (809-808) if we drive the back roads. Drivers need to go 65 mph to make the ten hour trip. They are allowed to drive only ten hours a night and work five, for a total of 15 hours. This trip is 4 hours and 55 minutes each way. So, on a round trip they have only 5-10 minutes leeway before they must stop driving. If he had a choice, he would prefer to drive the trip straight through. (PX 3, p. 40). While there would be mandatory short breaks every 2.5 hours, there would be no safety reason not to drive straight through.

Drivers submitted their RTC time sheets every two weeks. He kept his hours on a driver's log for the DOT and an RTC time card. There should not have been any difference between the times on the two. (PX 3, p. 42). There might be a 15-minute discrepancy between the two because one cannot log 5-minute increments on the log. The RTC Employee Handbook requires employees to maintain an accurate record of all time worked. He recorded the actual time worked. They were required to show their "scheduled" time with any "exceptions," i.e., breakdowns, construction, traffic delays, bad weather, flat tires, drug testing. (PX 3, p. 44, 53-54, 57). He was paid for the "exceptions", i.e., fueling, pre-trip inspections over 15 minutes, he reported and RTC accepted. (PX 3, p. 56, 64-66).

Mr. Marangoni could not say the current RTC Handbook was the same as the one the drivers had to turn in to get the new one. (PX 3, p. 45). So, he was not sure the "completely relieved" language was in the earlier one. But, Mr. Marangoni testified, "[W]e were never completely relieved of duty. We were always on duty. . . because we were always with the truck". (PX 3, p. 45). RTC never disciplined him for leaving his truck. (PX 3, p. 54). RTC told us to go off-duty at our prescribed time according to the schedule. (PX 3, p. 45). He was not aware of any written rule requiring him to stay with his truck. (PX 3, p. 63). While he disposed of his logs, the originals had been submitted to RTC and he kept copies of all his (bi-monthly) schedule sheets. (PX 3, p. 46).

Mr. Marangoni testified at a second deposition, on April 22, 2002. (PX 14). Mr. Marangoni reiterated much of his earlier testimony. He last worked for RTC on February 13, 2002 having been fired for allegedly falsifying logs and stealing company time. (PX 14, pp. 18, 25). Mr. Marangoni denied both allegations, testifying he actually “claimed less time.” He admitted accusing Mr. Rood of stealing the drivers’ pension funds. (PX 14, p. 102). He now is a negotiator for the APWU attempting to negotiate the first Union contract with RTC. (PX 14, p. 5). He knew he was being followed (by an investigator) when it occurred (January 28-30, 2002) and subsequently read the investigator’s report. (PX 14, p. 8). He disagreed with the report testifying he stayed at the USPS at the end of his trip working and moving trailers. (PX 14, pp. 11, 12, 82-85). He had also chosen to leave early on this date and, as usual, did not charge RTC for that time. (PX 14, p.10). However, he reported the scheduled departure time on his time card versus his actual departure time as he was required to do by RTC.¹⁴ Mr. Marangoni was adamant that Mr. Packo had told him to log his scheduled times on his time card and log versus his actual times. (PX 14, p. 76). He also testified he had not driven 70 mph as the particular truck will only go 65 mph. Since there was not enough time scheduled for the route, in 2002, he filed exception reports for his work time and so informed Mr. Packo. When he last checked the status of his RTC pension, RTC’s contributions were almost a year behind. His statement for April 2002 showed RTC had deposited some funds, however. (PX 14, p.27).

Mr. Marangoni testified extensively about route 809-808 as it was in 2001 and later. He testified that he had been departing about one half hour early on the 809-808 route for two to three years with RTC knowledge and admitted that in his earlier deposition he had testified that he would normally leave at 3:15. (PX 14, p. 39). He insisted the schedule did not give him enough time to fuel the truck and take a scheduled break, so he submitted exception reports for the refueling time to get paid. (PX 14, p. 46). Mr. Marangoni testified that while the drivers were on their break at the Pittsburgh BMC (in or after 2001) Mr. Packo had informed them they could take their truck into the city if they so desired as long as they were back in time to depart on schedule. (PX 14, p. 68). On this route, in 2001 and later, the policy was that drivers were paid for 11 hours of driving whether it took them less or more time, unless they submitted an exception report and explained why it took longer. (PX 14, p. 72).

Thomas J. Whalen

Thomas J. Whalen testified at a deposition held on November 15, 2001, in Rochester, NY. (PX 4). He presently works as a truck driver for RTC, hauling mail, and had done so since 1980. Pat Packo is and has always been his supervisor. (Dep. 9). He used to drive all the way from Rochester to Pittsburgh, route 803/806, but now drives route 801/802, half way to Pittsburgh, or Erie, PA. He had taken the 803/806 route when the NY Thruway had opened. (Dep. 23). In

¹⁴ Disturbingly, Mr. Marangoni testified that RTC was telling drivers to make their runs one way and not show it that way in their DOT log books. Moreover, he said he knew of instances where RTC pressured drivers to falsify their DOT logs. (PX 14, p. 105). In fact, RTC’s January 18, 1995 “Attention Drivers” policy, paragraph 3-A, tells drivers to fill out their time cards with the times listed on the HCR schedule. (PX 14, p. 111). The policy also informed drivers their log sheets and time sheets must match.

1998, he drove all the way to Pittsburgh and back to Rochester. Mr. Whalen testified about his pay and fringe benefits. (Dep. 12).

Mr. Whalen maintained the DOT-required driver's log and time cards for RTC. (Dep. 13). The two were not always the same. He identified the 1999 route 801/802 schedule, which was effective May 21, 1998. He now drives route 801, a "relay" route. (Dep. 17). RTC pays 8 hours for this route. He meets the driver of route 802 out of Pittsburgh at Exit 7, in Erie, PA, swaps trucks, and returns to Rochester, NY. (Dep. 16). The present route 801 has no breaks or off-duty times. (Dep. 17). When he works route 801, he arrives at the Henrietta Post Office at 1:30 A.M., as scheduled. (Dep. 20). Then, he inspects the truck, i.e., fuel, tires, belts, oil, radiator, etc.. and subsequently starts it up. Sometimes he completed his paperwork before his arrival to ensure he got it done. (Dep. 21). He can complete his pre-trip inspection of the tractor in 15 minutes, as scheduled, and the trailer takes another 7-8 minutes. (Dep. 40). Then, he finds a USPS dispatcher to obtain the necessary paperwork and subsequently hooks up and inspects the appropriate trailer. (Dep. 22).

When he drove route 803/806 the schedule had a one hour and five minute off-duty period at 1:00 P.M.. (Dep. 24). He tried to stop at an accessible small truck stop where he could buy a lunch, take it to the truck and eat, then listen to the radio. (Dep. 24). RTC never said the drivers could not leave the premises and go elsewhere, but he "pretty much" stayed with the truck, unless he needed a restroom break, to ensure it was taken care of and not blocked in. (Dep. 24). He arrived at the Pittsburgh BMC at 4:15 P.M., as scheduled. He would mostly fuel his truck after he got the mail trailer from the BMC so he could occasionally make up time (from his 9:00 P.M.-10:00 P.M. break) if fueling took longer or if there was a problem with the tractor or trailer. (Dep. 25-26). Between the 4:45 P.M. scheduled break at the BMC and 5:35 P.M. report time, he would go to the USPS "swing" room for milk or a vending machine and then leave Pittsburgh at 5:50 P.M. (Dep. 26-27, 44). During the scheduled 9:00-10:05 P.M. scheduled off-duty period, he would have coffee and eat. (Dep. 27). He would arrive back in Rochester at 11:50 P.M., chock and unhook the trailer, perform a post-trip inspection and complete his driver's report. (Dep. 28). RTC paid for 11 hours and five minutes for that route. He never skipped the off-duty periods to get in to Pittsburgh early because he liked to have the break to eat lunch. (Dep. 36-37). He preferred taking the two breaks and arriving on time. (Dep. 37). He thought the breaks were scheduled for his convenience. (Dep. 37). His testimony about being paid for fueling time varied. (Dep. 50-52). Fueling took about 10-15 minutes. (Dep. 53).

The 803/806 route had three breaks and he did not have a meal during each one. (Dep. 49). He had meals at the 1:00-2:00 P.M. and 9:00-10:00 P.M. breaks. (Dep. 49). He did not have meals at the BMC, only coffee. (Dep. 49).

Mr. Whalen testified no one at RTC had told him about a work rule allowing him to leave his truck unattended during breaks, until (later) "the idea of paying for us being with the truck or not . . . They said something about, 'You have a half hour'. . . lunch break" where you could leave your unit and be on your own. (Dep. 30, 45). However, he always stayed with the unit because his name was on the USPS dispatch slip and he felt responsible. (Dep. 30, 46). No

USPS employee had ever told him he needed to stay with the truck. He could not identify the RTC Employee handbook. (Dep. 31). At one point, RTC would pay them extra for arriving early at the Rochester Post Office. When asked if he recorded his actual time on his time cards versus the scheduled times, he said it “varied.” (Dep. 32-33). He recalled RTC saying “If you want to give us 15 minutes of your time one day and then get in early another day, then that’s a wash”. (Dep. 33, 42). On cross-examination, he admitted RTC would pay him for weather or USPS delays. (Dep. 40).

When he first did the Rochester to Pittsburgh route he was not told he was completely relieved of duty during off-duty times. (Dep. 35). Then, at some point he believes Mr. Rood articulated the “off-duty” rule at a driver’s meeting. (Dep. 35). Other employees had mentioned the pension contributions were not being put in regularly. (Dep. 36). He was unaware of the “exception” reports. (Dep. 41). He has worked a 40-hour week since 1998. (Dep. 48).

RTC Employee Handbook April 1996

The RTC Employee Handbook (April 1996) states:

RECORDING YOUR TIME

All employees are required to maintain an accurate record of all time worked. Work time begins when you report to your facility and ends when you leave the facility. Do not report to work prior to your scheduled time. Neither the company nor the employees benefit from your reporting early for work.

DRIVERS

In addition, late operation slips must be filled out for every late operation, departure or arrival, of 15 minutes or more. This is for your protection as well as ours.

Exception Reports:

In the event you are unable to complete a trip, including pre-trip and post-trip duties, within the total time specified on your route Schedule, you must complete an Exception Report. . . and turned in with your time card.

BREAKS

. . . Certain route schedules include time for meals and breaks. You are expected to take the meal and break time and record it as “off-duty”. During such the meal

and break time, you are completely relieved of duties and are free to go where you wish. We have scheduled meals and breaks to coincide with locations on your route that have adequate facilities. Drivers shall return to duty immediately upon termination of the break as scheduled.

Drivers may occasionally find it necessary to stop en route for a short break. Drivers may take such breaks only if doing so does not prevent the driver's ability from meeting his/her Route Schedule.

PRE-TRIP AND POST-TRIP DUTIES

Time for pre-trip and post-trip duties are incorporated into Route Schedules. Such duties include inspections, fueling and paperwork. It is expected that such duties can be completed within a period of 15 minutes or less at the beginning and end of your shift. Time cards and log books must reflect the actual time such activities are under taken, both at the commencement and termination of your trip.

Regarding a driver who is required to fuel his/her (sic) truck at the termination of a trip, we expect that fueling time will be used efficiently so that paperwork and inspections will be completed while the truck is being fueled.

During the period in question, RTC had five different schedules for the routes, under this contract: 4/15/96 through 5/21/98; 5/21/98 - 3/29/99; 3/29/99 - 12/6/99; 12/6/99 - 1/17/00; and, 1/17/00 on. (JX 4). According to Mr. Rood, since the 2001 contract renewal, RTC has added 15 minutes at the end of the routes and lowered the break times. Now, the outbound off-duty period is 15 minutes shorter and the return trips have no breaks.

ILLUSTRATIVE RTC ROUTE SCHEDULES
PITTSBURGH, PA, BMC - ROCHESTER, N.Y.
HCR 14424

<u>TRIP 801 (5/21/98)</u>		<u>TRIP 802*(3/29/99)</u>		<u>TRIP 803-806 (5/21/98)</u>	
Report time	1:30 a.m.	Report time	1:15 a.m.	Report time	10:00 a.m.
LV Rochester	1:45 a.m.	LV Pitts BMC	1:45 a.m.	LV Rochester	10:15 a.m.
AR Exit 7 PA	5:15 a.m.	AR Pitts GMF	2:15 a.m.	Off duty	1:00 p.m.
LV Exit 7 PA	5:30 a.m.	LV Pitts GMF	2:30 a.m.	On duty	2:05 p.m.
AR Rochester	9:15 a.m.	AR Exit 7 PA	4:45 a.m.	AR Pitts BMC	4:15 p.m.
<u>Finish time</u>	<u>9:30 a.m.</u>	Off duty	5:00 a.m.	Off duty	4:45 p.m.
Paid hours	8 Hours	On duty	5:30 a.m.	Report time	5:35 p.m.
Actual hours	8 Hours	LV Exit 7 PA	5:30 a.m.	LV Pitts BMC	5:50 p.m.
		AR Pitts GMF	8:15 a.m.	Off duty	9:00 p.m.
		LV Pitts GMF	8:30 a.m.	On duty	10:05 p.m.
		AR Pitts BMC	9:00 a.m.	AR Rochester	11:50 p.m.
		<u>Finish time</u>	<u>9:15 a.m.</u>	<u>Finish time</u>	<u>12:05 a.m.</u>
		Paid hours	7 Hours 30 min.		11 Hours 5 min.
		Actual hours	8 Hours		14 Hours 5 min.
<u>TRIP 804-805</u>		(3/29/99)	<u>TRIP 809-808</u>	(5/21/98)	<u>TRIP 810-807</u>
					(3/29/99)
Report time	9:45 a.m.	Report time	2:45 p.m.	Report time	2:30 p.m.
LV Pitts BMC	10:15 a.m.	LV Rochester	3:00 p.m.	LV Pitts BMC	3:00 p.m.
Off duty	1:00 p.m.	Off duty	6:00 p.m.	Off duty	6:00 p.m.
On duty	2:05 p.m.	On duty	7:05 p.m.	On duty	7:05 p.m.
AR Rochester	4:15 p.m.	AR Pitts BMC	9:00 p.m.	AR Rochester	9:00 p.m.
Off duty	4:25 p.m.	Off duty	9:30 p.m.	Off duty	9:10 p.m.
Report time	5:40 p.m.	Report time	9:45 p.m.	Report time	9:50 p.m.
LV Rochester	5:50 p.m.	LV Pitts BMC	10:00 p.m.	LV Rochester	10:00 p.m.
Off duty	9:00 p.m.	Off duty	1:00 a.m.	Off duty	1:00 a.m.
On duty	10:05 p.m.	On duty	2:05 a.m.	On duty	2:05 a.m.
AR Pitts BMC	11:50 p.m.	AR Rochester	4:00 a.m.	AR Pitts BMC	4:00 a.m.
Fuel	XXXX	<u>Finish time</u>	<u>4:15 a.m.</u>	<u>Finish time</u>	<u>4:15 a.m.</u>
<u>Finish time</u>	<u>12:20 a.m.</u>				
Total paid hours	11 hours 10 min.		11 hours, 5 min.		10 hours, 55 min.
Actual Hours	13 hours 35 min.		13 hours 30 min.		13 hours, 45 min.

The 5/21/98 trips: Rochester 801 ran back roads and 55 mph. All 3/29/99 trips ran at 65 mph.

RTC PRE-TRIP TIMES
Eff: March 29, 1999

We have added 15 more minutes to PRE-TRIP / (REPORT TIME) to most of the scheduled trips. Time was not added to those trips that are back to back. The same goes for extra trips. . .

The Contract

The “General Provisions” of RTC’s basic contract with the USPS was admitted as PX 13. It is called a “Basic Surface Transportation Services Contract.” Paragraph 4 of the Contract contains the “certainty, celerity, and security” of the mail provision.

Paragraph 14(c) of the contract addresses security of the mail. It states,

The Contractor shall protect the mail from loss, depredation, or damage. The mail shall be transported in an enclosed, water-proof compartment, equipped with secure locking devices, which shall be kept locked at all times except when access is required for performance of service under this contract.

The contract requires inspection of equipment, specifically the brakes, steering mechanisms, lights and reflectors, tires, horn, windshield wipers, and rear vision mirrors. (PX 13, para. 5(b)(2)(b)).

The contract defines “on-duty time” as “that time from which the driver begins to work or is required to be in readiness to work until he is relieved from work and all responsibility for performing work.” (PX 13, para. 5(e)(4)(a)i). This is identical to DOT’s definition.

The contract defines “driving time” as “that time spent on a moving vehicle and any interval not in excess of 10 minutes when a driver is on duty but not on a moving vehicle.” (PX 13, para. 5(e)(4)(a)ii).

RESPONDENTS’ EVIDENCE

Mr. Pat Packo

Mr. Pat Packo sat through the hearing as the company’s party representative. Mr. Pat Packo has worked eighteen years for RTC, the last seven as the Director of Operations. He reports directly to George Rood. He was previously the Safety Director. He is responsible for RTC scheduling. He supervises the USPS contracts daily, including number 14424, which began on September 19, 1992. Mr. Packo’s concern is being on time. He identified RX 13 as the original contract and page 18 has the Service Requirements and Prohibitions. Mr. Rood sets final RTC policy regarding contract 14424. RTC’s only business is hauling mail for the USPS.

His contract contact person at the USPS is Al Macia and was so from 1998-2000. PX 5 the contract renewal has Al’s signature. Mr. Packo and Mr. Macia speak several times a month.

He never spoke with Al about security, or drivers remaining with the trucks nor did Al raise the matter. Neither one of them raised the issue regarding driver breaks. Mr. Macia never discussed any problems with driver arrival or departure times. Mr. Packo identified PX 10, page 5, the HCR Schedule Information. The USPS tells RTC when to depart the postal facilities, but not when to have drivers report to RTC.

RTC has no policy requiring drivers to remain with their trucks. He was unaware of any regulation requiring that and never told the drivers they had to remain with the trucks. Mr. Packo denied telling drivers to report their times based on the route schedule rather than their actual times. There is no connection between the annual miles under the contract and payments to drivers. He identified the policy regarding relief in the RTC Employee Handbook and said they had gotten advice from Bill Hobart.

Mr. Packo explained that in 1992 RTC ran these routes under a "relay" system with one driver leaving each location, i.e., Rochester or Pittsburgh, and swapping loads (at a meeting point). (TR 422-424; 508-509). Some drivers had complained of the six work day, 39-hour, scheme, resulting from the relay method. (TR 422-424). Under the contract, the USPS did not pay highway tolls. Several years ago, the speed limits on the highways (which they had not been using) were increased. RTC found by utilizing off-duty times, they could come up with the money to pay highway tolls and permit the drivers to use the toll roads (and thus work a 4-day week with 40 hours) without incurring additional costs. Now, the runs are round trips, which gives drivers more days off. The USPS was not aware of the change from relays to round trips. Mr. Packo considers DOT rules, i.e., "hours of service" and duty hours, in establishing breaks, etc. He does not recall telling Mr. Waldow the breaks were for RTC's benefit. RTC has added 15 minutes to the runs in Cranberry, PA. Some schedules have been changed to add more pre-trip inspection time. Break times cannot affect USPS scheduled times. (PX 5).

According to Mr. Packo, to be paid for overtime, drivers must submit "exception" reports. A driver would need a Form 5500 for USPS delays. Such reports would be filed for breakdowns. He has denied payment of some exception reports where the driver made up time en route; in such a case the driver would be fudging time.

Mr. Packo fired three employees: Norm McFarland; Tom Kelly; and Larry Marangoni. RTC had a private investigator follow Larry Marangoni. After reconciling his time cards and logs with the investigator's report he ascertained Larry had been fudging his time. In July 2001, a USPS contract change reduced time by 15 minutes. RTC did not change the drivers' time. Larry Marangoni continued to ask for payment of an extra half-hour per day arguing the time en route was insufficient. Norm McFarland had been claiming "on-time" arrivals when he had, in fact arrived early. Tom Kelly had been asking for 20 minutes extra time.

RTC provided each driver with a lock and key for the mail trailers and the USPS would seal them. RTC has never lost or destroyed mail, under the contract. Mr. Packo himself has left mail trailers at "drops" daily, under several other contracts, i.e., numbers 14201 and 13015.

According to Mr. Packo, the first break on route 810-807 is scheduled at 6:00 P.M. because it takes three hours to get to New York from Pittsburgh. He told drivers they could take their one hour five minute break any time, as long as it was at a facility where they could take a break. He identified PX 9 which reflects the 15 minutes added to the Cranberry side of contract 14424. If RTC removed the breaks from route 804 and the driver did not stop en route, he would arrive at Rochester early in violation of the contract.

The USPS gives RTC “extra” trips on the routes under the contract. These are done as round trips without breaks because the USPS does not fix a schedule, other than RTC having four hours to get the extra truck on the road.

According to Mr. Packo, if RTC was debarred, 150 people, including himself, would lose their jobs and RTC would go bankrupt. RTC-union negotiations have been going on for some ten months. None of the drivers fired were let go for their union activities.

Mr. George H. Rood

Mr. George H. Rood testified he is the president and owner of RTC and had been since 1962. His wife is a co-owner. She handles fringe benefit matters. The company’s business has always and only been hauling mail for the USPS. They employ about one hundred forty drivers and twenty to twenty-five support personnel.

He has been a member of the National Star Route Mail Contractor’s Association (“NSRMCA”) for thirty five years. The NSRMCA has national and state meetings which he has regularly attended. They also publish a monthly periodical, the “Star Carrier” which runs a “legal” column, authored by Bill Holder, the Association’s lawyer.

RTC has seventeen to eighteen contracts with the USPS. In formulating his bids for the USPS contracts, he considers RTC’s costs, such as toll costs. RTC was awarded USPS contract number 14424 in about 1992 or 1994 and it has been renewed twice. Mr. Arsenault was not the original contracting officer. The USPS has never complained to RTC regarding its contract performance. Neither the USPS nor the DOL ever told him that drivers must stay with the trucks. Having met with Mr. Waldow, the DOL investigator, he does not believe RTC was in violation of the Act because he had read about this subject in the Star Carrier and discussed the matter with Bill Holder. He had not consulted the DOL to ask if RTC’s policies complied with the SCA. Before this matter arose, he had only ever had contact with the DOL twice, but was never accused of any violation.

Mr. Rood explained the breaks were factored into the routes under contract 14424 to provide a better job for the drivers and give them meal times. Before the 1999 route set up, the drivers had been working six days a week doing “relays” and only 39 hours. With the increase in the highway speed limits, RTC was able to put runs on the New York Thruway and arrange for the drivers to drive round trips working four days per week and for more hours.

Mr. Rood is familiar with all the routes under the contract having driven them himself. RTC tries to establish breaks in developed areas. There are several truck stops and plazas along the routes. There are six to eight truck stops in Erie, PA, and service plazas on the NY Thruway. However, it is sparse between Erie and Pittsburgh. Drivers need not stop in sparse areas. If drivers wanted to stop in Erie or Buffalo they could take breaks there. The truck stops have amenities. Some are like a mall or little city. RTC does not proscribe stops there. RTC told their drivers there was no need to stay with their trucks. (TR 532-533). Mr. Rood himself has left the trucks unattended. RTC has a Cleveland to Pittsburgh route of 108 miles with no scheduled breaks. Once the trucks are dropped off, drivers have no further responsibility.

Mr. Packo handles the route set up. Since the 2001 contract renewal, RTC has added 15 minutes at each end of the routes and lowered the break times. Now, the outbound off-duty period is 15 minutes shorter and the return trip has no break.

For the first three months on the job, RTC supplies fringe benefits. However, drivers are not entitled to hospitalization for 30 days. RTC is now starting to deposit fringe benefits quarterly. Last year, RTC did not make quarterly deposits, but their pension folks had informed them that was appropriate as long as payments were made by year end, under ERISA.

Mr. Rood identified PX 8, the Employee Handbook, and testified their attorney had drafted the policy which he then approved.

Mr. Rood was involved in RTC's termination of Larry Mangoni and Tom Kelly. He had consulted with their lawyer about the firings.

John Rochford

John Rochford, a private investigator, testified concerning his surveillance of RTC driver Marangoni, on January 29-January 30, 2002. The substance of his observations is contained in a detailed report. (RX 9). The report shows Larry Marangoni deviated slightly from the schedule while driving route 809-808 on those dates. Mr. Marangoni left the Rochester GMF at 2:28 P.M. versus the scheduled 3:00 P.M., arrived at the Pittsburgh BMC 2 minutes late (8:47 P.M. versus 8:45 P.M.), left the Pittsburgh BMC 35 minutes early (9:25 P.M. versus 10:00 P.M.), and arrived at the Rochester

GMF 59 minutes early (about 1:56 A.M. versus the scheduled 2:55 A.M.). The investigation does not show when he finished his route, which was scheduled to be completed at 3:10 A.M.. Other witnesses established this report was used as a basis for firing Mr. Marangoni for "theft of time."

The schedule (7/30/01) for route 809-808 set a 50-minute off-duty meal break (any time) en route. It set the second, 35-minute, off-duty meal break between 9:10 P.M. and 9:45 P.M.. The first break was to be taken before reaching Pittsburgh and the second after arriving and

fueling but before leaving Pittsburgh. Mr. Marangoni took two breaks totaling 59 minutes before reaching Pittsburgh and cut his second, 35-minute break, in Pittsburgh, short by 20 minutes. Mr. Marangoni took the 37-minute break at a rest stop, off I-79, about 50 miles from Pittsburgh. He took another 22-minute break at a Sunoco gas station in Cranberry, PA, at 8:19 P.M. No break was scheduled for the 4-hour, 55-minute return trip to Rochester. On his return trip to Rochester, he stopped after a toll booth for about 4 minutes.

Carl H. Bass

Carl H. Bass is a labor law consultant with forty years experience, having served as a DOL investigator and district director. He testified he had been involved in about 40,000 investigations most of which involved the FLSA and had been involved in hundreds of SCA cases, including several hundred mail-hauling contracts. Admittedly, he had never worked in the mail-hauling industry, never hauled mail, nor worked in contracting.

Mr. Bass explained he had reviewed RTC's materials, including routes and Employee Handbook, actually drove a route with Mr. Rood, the USPS contract, the Wage & Hour Determination, and some deposition testimony, but had not spoken with RTC employees. He had never heard of a requirement for mail haulers to remain with their trucks. Nor had he heard of the "certainty, celerity, and security" clause contained in the present USPS-RTC contract. He described RX 16, his report of a trip made with Mr. Rood, which included photos and a description of the services and amenities available at various stops and exits on the Rochester, NY, to Pittsburgh, PA, route. He observed nearly every one had places to eat. He looked at nineteen stops along the route, including seven truck stops. Some had shopping facilities, service plazas, fuel facilities, gift shops and restaurants. However, he had not driven the route according to any of the contract schedules.

Mr. Bass had several opinions concerning: (1) whether drivers were fully relieved from duty on their meal breaks; (2) inspection times; and, (3) debarment. He was unaware the drivers had been told they could leave the area of their trucks while on breaks. In his experience, meal breaks could be properly not compensated. He referred to all the off-duty times here as "meal" breaks. He testified RTC is still not paying for the break times.

Mr. Bass believes the "sanctity of the mail" had no bearing on whether drivers were completely relieved. The drivers on the routes had numerous opportunities to stop at meal break facilities. Drivers generally should be able to perform their pre-trip inspections of their tractors in less than 15 minutes. Mr. Bass testified about the factors he would consider in determining the appropriateness of debarment, which he believed was not appropriate here. He reiterated the importance of Mr. Rood's reliance on legal advice and asking for advice from appropriate people at conferences in determining the compensability of the breaks. Moreover, he was concerned because DOL had apparently never answered a letter from Mr. Rood's lawyer. DOL's investigation of RTC in 1993 was resolved with a telephone conference.

Jennifer Newel

Jennifer Newel testified that she is Mr. Rood's daughter and works as RTC's secretary/treasurer. Mrs. Rood administers the RTC employees' pension fund. She explained her duties and identified three respondent exhibits consisting of copies of checks she had signed and written to the order of RTC's pension contributions company between January 1998 and June 30, 2000. (RX 21, 22, 23). She testified the payments were timely made and she has had no complaints from the DOL. She admitted that bank cancellations or processing is not reflected on any but the 1998 checks. She made pension fund payments in 2001, but could not recall how often. She made seven monthly pension fund payments in 2002 some of which were owed from 2001. She admitted RTC has five pension fund payments due.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

The parties admitted and or stipulated to the facts establishing jurisdiction and I find that this forum has jurisdiction over the parties and subject matter of this dispute.

Burden of Proof

In an administrative proceeding, the proponent of the Order of Reference, which in this case is the DOL, bears the burden of going forward with the evidence. The required standard of proof is a showing by a preponderance of the evidence. *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240 (D.C. 1980) cert. denied, 449 U.S. 834 (1980); *Bender v. Clark*, 744 F.2d 1424 (10th Cir. 1984).

Labor Standards Provisions

The contract, in the present case, awarded by an agency of the United States government, provided for the hauling by truck of the U.S. mail and is subject to the labor standards provisions of the Service Contract Act and its implementing regulations. 41 U.S.C. § 351 and 29 C.F.R. § 4.6. The Act requires contracts subject to it contain wage determinations issued by the Department of Labor, pursuant to 29 C.F.R. Part 1, which are based upon the prevailing wages for the area of issuance.

Background

It is established that RTC and Mr. Rood have satisfactorily performed mail hauling contracts for nearly forty-two years. Mr. Arsenault called RTC a "quality performer." Mail hauling is RTC's entire business. Before the highway speeds were increased to 65 mph, several years ago, both RTC and the USPS expected the contract routes between Rochester, New York, and Pittsburgh, Pennsylvania, would be driven at slower speeds and use of the toll roads was not anticipated, by either RTC or the USPS. In fact, the USPS had not wanted to pay for the added costs for the contractor to use the toll roads. The contract routes were originally driven utilizing

a “relay” system, where drivers from each destination would meet in the middle, swap trailers, and return to their origin, rather than the present round-trip method. At that time, the RTC drivers were averaging a 39-hour work week and working six days per week. With the new, higher, speeds, the 275-mile one-way trip could be completed (non-stop) in 5 ½ hours or in 11 hours for a round-trip, according to the USPS contracting officer, Mr. Arsenault. RTC’s schedules were primarily based upon the USPS’s required departure and arrival times.

No FLSA or SCA compensation issues arose under old the relay system used by RTC. However, RTC claims the drivers had complained about the limited hours over multiple days. Thus, RTC determined that by driving round-trips, using the toll highway, at the higher speeds, schedules could be developed giving the drivers 40-hours of work per week in four days rather than the former 39 hours in six. Mr. Rood testified RTC wanted to give the drivers meal breaks as well. RTC calculated that it could fund the highway tolls incurred with this new round-trip route method by incorporating non-compensable off-duty periods.

Mr. Arsenault’s USPS people calculated that the new toll costs, for route 804, were about \$53,000 per year and the cost savings from the non-compensable off-duty periods were about \$81,000 per year. Thus, under the new round-trip schedule for this route, RTC gained a net of about \$28,000 per year. Even if RTC had not restructured the schedules for the benefit of their driver-employees, but rather to increase its profits, that would have been entirely appropriate under the terms of the contract. In fact, it may have been a wise business decision. At first glance, this appeared to be a “win-win” solution for RTC and the drivers. In the end, it may be a good deal for the USPS which will now re-evaluate its costs and contracts to consider use of the toll roads and the higher speed limits.

In any case, the USPS, of necessity, had very strict schedules with definite arrival and departure times, in order to assure the smooth flow of the mail. (PX 6). Moreover, DOT regulations limit drivers’ actual driving time to 10 hours a day. All this was considered by Mr. Packo in creating the schedules under consideration. In fact, the round-trip “extra” trips which the USPS has RTC perform do not have the mandated arrival and departure times and are thus driven straight-through without breaks. Most of the drivers testified that they would prefer such straight-through round-trips without mandated breaks. Admittedly, most drivers do and would stop for short breaks along the way. However, the wishes and convenience of the drivers are not criteria in determining compensability.

During the time period in question, January 1, 1998 through December 30, 2000, RTC had five differing schedules in place for the routes, under the relevant USPS contract here. Each of the different schedules varied only slightly. But, essentially each had an unpaid scheduled break between Pittsburgh and Rochester, an unpaid scheduled break between Rochester and Pittsburgh, and an unpaid waiting period at the mid-route destination point, i.e., in either Pittsburgh or Rochester of 15-75 minutes.¹⁵ The waiting periods at the mid-route destinations, i.e., Pittsburgh

¹⁵ Thus, for example, the one 30-minute break on route 802 (3/29/99) would be conceded to be appropriate.

or Rochester, appear to have been constructed to meet the rigid USPS pickup or delivery schedules. The DOL agreed that RTC could schedule a 30-minute unpaid lunch break at these mid-route destination points. The 35-minute to 1 hour and 15 minute en route breaks or “off-duty” periods, gave drivers rest and time to eat thus breaking up the five-hour, 275-mile, one-way trips.¹⁶

It is difficult to conceive how the round trips could have been structured much differently considering the USPS schedule, the length of the trips, RTC’s workforce and the DOT 10-hour driving limitation. The old relay system could have been re-instituted. RTC could have had drivers go only one way and spend the night uncompensated in Pittsburgh or Rochester. One of the longest round trips, for example, was route 803-806. How could one meet the USPS schedule of leaving Rochester at 10:15 A.M. and arriving in Pittsburgh at 4:15 P.M. (a span of 6 hours), a 4-hour 55 minute drive, without incorporating an extra time period of 1 hour and 5 minutes? Since the USPS Pittsburgh arrival time is 4:15 P.M. and the Pittsburgh departure time was 5:50 P.M., a 65-minute hiatus existed beyond the driving time. Another such hiatus existed between the 5:50 P.M. Pittsburgh departure time and the 11:50 P.M. arrival time in Rochester. Thus, in a 14-hour and 5-minute work day, in which the drivers were paid for 11 hours and five minutes, there were three hours of unpaid breaks. Yet, the drivers were paid for an hour and 5 minutes more than the 10 hours actual driving time allowed by DOT regulations. Thus, the typical RTC schedule at issue accommodated the DOT driving time limitations, gave the drivers more hours in a shorter work week, and helped pay the added Thruway toll costs with savings from the scheduled off-duty periods. It also gave RTC more profit.

It appears most 8-hour work days commonly include a lunch break of 30-60 minutes and often a 15-minute break in the early part of the shift and one in the late part of the shift. Generally, such short 15-minute rest or coffee breaks are compensable and the lunch breaks are not. The underlying rationale for the non-compensability of lunch periods is the presumption that the employee would be spending the time on his or her own eating lunch in any case. But, when the employee must work during the lunch period, even with a sandwich in hand, the time is likely compensable for it is no longer the employee’s free time to eat. Other than the ten-hour driving limitation, it appears truck drivers have no DOT mandated breaks, although prudence and necessity might dictate taking rest stops.

The DOT appears to encourage giving drivers long periods of rest, i.e., 8 hours, while “traveling” by counting all non-driving travel time as “on-duty” time unless the driver is given 8 hours off duty when arriving at the destination. Thus, if a driver were to travel from Rochester, N.Y., to Pittsburgh, PA, and spend the night off-duty, the entire non-driving time where no responsibility to the carrier is involved, would count as off-duty time, under DOT rules. Such off-duty time would likely be non-compensable under SCA/FLSA rules as well. Arguably, such

¹⁶ At a constant 55 mph, one could drive the 275 mile route from Pittsburgh to Rochester or the other way around in about 5 hours, and the schedules allowed anywhere from 4 hours, 45 minutes to 5 hours and 55 minutes of actual driving time. The New York Thruway speed limit was changed to 65 mph at some point reducing the actual drive time. It is 162 miles between Rochester and Erie, PA, and about 128 miles between Erie and Pittsburgh, PA.

overnight periods are for the employer's benefit, but the government recognizes requiring regular pay for such away from home periods is inadvisable for many reasons. Likewise, many occupations require employees to remain on the employer's premises overnight or on-call, on or off the employer's premises, which generally involves little actual direct work for the employer, but occasional periods of actual work. At times, common sense or logic will not yield the correct response regarding compensability of such periods, under the law. Rather, the regulations attempt to supply the answers with illustrations and general guidelines and when the regulations fail the courts attempt to do so. Often, as in this matter, the correct answers are far from clear. Unfortunately, the ramifications of this lack of clarity can be both costly and severe.

The DOT counts all driving time, all inspection times, all servicing times, waiting for dispatch times, loading and unloading times, repair times, time spent in the vehicle (other than sleeping in a berth), and time spent performing work for an employer as "on-duty" time. Time waiting to be dispatched is not considered "on-duty" if a driver is "completely relieved." On-duty time is expanded to include the time a driver is required to be in readiness to work until such time he is relieved from work and all responsibility for performing work. The RTC-USPS contract contained similar consistent definitions, but that only defined the obligations between the parties to the contract, not the drivers.

Under DOT regulations, it appears the 50-minute break from 4:45-5:35 P.M. at the Pittsburgh BMC for route 803-806, the 15-minute break from 9:30-9:45 P.M. at the Pittsburgh BMC for route 809-808 and the 40-minute break between 9:10-9:50 P.M. for route 810-807 at the Rochester USPS facility, could be considered "off-duty" time, if in fact the drivers were completely relieved. The times en route, as structured by RTC, would likely not count as "on-duty" times because the drivers were not required to spend it in the vehicles.

Compensability of Off-Duty Periods

Generally

"In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to do work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace." 29 C.F.R. § 4.178. Thus, the resolution of these matters may not depend solely on what the employees were "required" to do or not do by RTC, but also what RTC "suffered" or "permitted" them to do or not do. In order to "suffer" or permit the drivers' actions, RTC must either have known or reasonably should have known about such activities. See, 29 C.F.R. § 785. The fact that RTC addressed the off-duty periods in their Handbook and that Mr. Rood addressed the topic at a drivers' meeting shows some knowledge on its part that at least some RTC drivers believed they had to remain with the mail or their trucks.

The RTC Employee Handbook (April 1996) clearly states the drivers are "completely relieved" of duties during their off-duty periods. It told the drivers they were "expected to take the meal and break time." This policy was developed after obtaining legal advice, albeit informal.

Moreover, the Handbook states, “[W]e have scheduled meals and breaks to coincide with locations on your route that have adequate facilities.” The USPS contract itself, which the drivers did not see, did not address “off-duty” periods, although it defined “on-duty” time identically to DOT’s definition. There is simply no way to construe this clear language other than to mean the drivers were to be off-duty during the scheduled breaks. RTC did not operate under any union agreement at the time of the hearing, which might impact upon this interpretation. The Employee Handbook clearly addresses the off-duty periods and, along with Mr. Rood’s talk at the drivers’ meeting was a reasonable attempt to resolve the matter.

“[T]he test for whether an employee’s time constitutes working time is whether the time is spent predominantly for the employer’s benefit or for the employee’s.” *Albuquerque*, 178 F.3d 1109, 1116 (10th Cir.) and *Henson*, *supra* (8th Cir.). The District Court, in *Marti*, clarified this test by saying the effect of the break is not the focus, but rather whether the employee’s activities (during the breaks) predominantly benefitted the employer. The Sixth Circuit has adopted this predominant benefit test in *Hill*, also looking to determine whether an employee engages in “any substantial duties” for the employer during the break.

There is no doubt that periods of inactivity during employment may be considered “on-duty” and compensable time. *Armour*. The DOL regulatory guidance does not define “waiting time”, but rather sets forth advice on how to determine whether it is time worked, referring the reader to “common sense” and “general concepts of work.” Unlike the DOT regulations, “on-duty” time, is not explicitly defined in the DOL regulations, but it involves “periods usually of short duration and unpredictable where the employee is unable to use the time effectively for his own purposes. . . . Waiting here is integral to the job and the time belongs to and is controlled by the employer.” “Off-duty” time is defined as periods during which an employee is: (1) completely relieved from duty; and, (2) which are long enough to enable him to use the time effectively for his own purposes. The Tenth Circuit relied on this regulatory language in *Albuquerque*, *supra*.

In *Manning*, *supra*, the ARB created a three-pronged test for determining whether layover time is non-compensable, under the SCA: (1) the employee must be completely relieved from duty; (2) the employee must be definitely told in advance that he may leave the job and will not have to commence work until a definite, specified time; and, (3) the leave period involved must be long enough to enable the employee to use the time “effectively for his own purposes.”

RTC drivers were unquestionably informed in advance that they were completely relieved during off-duty periods. Although construction of the RTC Handbook language leaves no ambiguity, i.e., the drivers are “completely relieved”, that does not end the inquiry into this factor, for under the regulatory guidance one must examine the drivers’ actual practice and RTC’s knowledge of the same.¹⁷ Not only did the RTC Employee Handbook explicitly resolve the off-

¹⁷ 29 C.F.R. § 785.13 states, “The mere promulgation of a rule against such work (work suffered or permitted) is not enough. Management has the power to enforce the rule and must make every effort to do so.”

duty matter, no one at RTC ever gave the drivers any contradictory advice.¹⁸ Mr. Kosto testified that Rood began telling the drivers they were completely relieved when RTC began having trouble with the DOL, although no one at RTC had ever told him to stay with the mail. Mr. Whalen testified that when he first drove the Rochester to Pittsburgh route (803-806) he was not told he was completely relieved of duty during off-duty times. According to Mr. Whalen, at some point Mr. Rood told the drivers that at a drivers' meeting. Mr. Whalen was admittedly unfamiliar with the RTC Employee Handbook and exception reports. Given the fact the Handbook explicitly addressed the "completely relieved" matter, there would have been no need for RTC supervisory personnel to repeat the admonition until they learned about the complaints of some drivers. Thereafter, Rood did so.

The parties, in this case, chose to focus on the third test, that is whether the periods involved were long enough to enable the employee to use the time "effectively for his own purposes".¹⁹ This is an indeterminate concept which certainly has and will change as our society technologically evolves. Perhaps, like pornography, it is not susceptible to definition, but we know it when we see it.

*Mail Security*²⁰

The matter of mail security is somewhat of a red herring. While USPS expeditors did likely tell the drivers (except Mr. Whalen) the mail must always be attended or within view and that they would surely face discipline if something turned up missing or damaged, and the "word" got around to the drivers, no one at RTC ever told them this. The RTC Employee Handbook indicates quite the opposite. Mr. Packo testified he never told the employees this. The USPS contract did not explicitly require it, nor does any USPS statute or regulation. Moreover, even if drivers had such an admirable responsibility, that fact alone does not mean that their off-duty periods were not their own.²¹ *Hill, supra*. Despite Mr. Arsenault's strong feelings regarding the "sanctity" of the mail, undoubtedly shared by other USPS employees with whom Mr. Waldow spoke, even the former admitted the contractual language, "certainty, celerity, and security" leaves open the issue. (TR 284-287, 314). Mr. Arsenault believed the "security" language referred to locks on the trailers and waterproofing, testifying nothing in the contract explicitly requires the drivers to remain with the mail. Nevertheless, he believed leaving the mail unattended would constitute unauthorized abandonment of the mail. (TR 242-243). Mr. Rood himself had

¹⁸ Although Mr. Montalvo testified that Mr. Packo and Randy, another supervisor, had told him he must stay with the trailer when he was hired. (TR 202). He also believed an USPS expeditor had told him so, as well.

¹⁹ RTC must have been faced with a conundrum, that is if the breaks were too short, DOL would argue they were not long enough to be effectively used for the drivers' own purposes. On the other hand, since these breaks were slightly more than an hour DOL believed that they were too long to be compensable.

²⁰ I refused to admit into evidence and do not consider a post-hearing affidavit from Mr. Arsenault's superior contradicting the latter's opinion regarding the "sanctity" of the mail.

²¹ *Maxfield, supra*, is irrelevant on this matter as the record did not address it.

frequently left such mail trailers unattended and the testimony was that such trailers had been left unattended under other contracts. The drivers had no legal duty to attend the mail at all time. I find even if the drivers had a duty to safeguard the mail, it was so insubstantial in and of itself as to not interfere with their personal “off-duty” time. This is true regardless of whether RTC knew of the driver’s impressions or not or even if they reasonably should have so known. There is not much more RTC could have done to dispel the drivers’ misperception; they explicitly informed the drivers otherwise.

Meal Periods

The RTC Employee Handbook states, “[W]e have scheduled meals and breaks to coincide with locations on your route that have adequate facilities.” Mr. Rood drove these routes himself and they were structured as the Handbook says. Mr. Packo testified he told the drivers they could take their one hour and five minute break any time as long as it was at a facility where they could take a break. Moreover, no driver testified that he was ever criticized over the location he took his breaks. The drivers testified they could not park on the side of the New York Thruway, which constitutes a good portion of the Rochester, NY, to the Pennsylvania state line portion of the trips. Mr. Rood described a number of the possible off-duty break locations. Most were near plazas or truck stops, some of which were like mini-shopping malls or little cities. While such locals are fewer along the 128-mile distance between Erie, PA, and Pittsburgh, PA, the longer Erie to Rochester, NY, portion has many. Mr. Rood testified the drivers need not have stopped in any “sparse” areas. In fact, the drivers’ routes, along Interstates 90 and 79, seldom took them more than ten to fifteen miles away from cities and town all with populations over 6,734 (twenty-eight times larger than *Manning’s* Kingsbury, TX).²² Mr. Rood said he had no problem if a driver left a truck completely and took a taxi 20 miles away during his break! (TR 537).

I observe there was no evidence presented that RTC drivers could not utilize their trucks to drive “off-route” a few miles during their off-duty periods. Additionally, after the drivers had dropped off the mail trailers, there was no convincing evidence they could not have used their tractors to drive around either Pittsburgh or Rochester. In spite of Mr. Marangoni’s feeling they were “stuck” at the USPS facilities, he admitted Mr. Packo had told the drivers they could take their trucks into the cities if they so desired so long as they were back in time to meet their departure times. Neither Pittsburgh nor Rochester are the “remote” west Texas or Northwest New Mexico towns, such as Kingsbury, Texas (population 250), or Cuba, NM (population 760), described in *Manning* and *Johnson*. Thus, the concerns expressed by the Board in *Johnson* and *Manning* that the drivers lacked an option “to go to some other sizable community” and the lack of public transportation are not present in this case. They not only had their own transportation, but were within reasonable proximity to large towns.

²² The following cities and towns with the populations listed were along the route: Batavico, NY (16, 310); Buffalo, NY (328,123); Fredonia, NY (10, 436); Erie, PA (108,718); Meadville, PA (14,318); Greenville, PA (6,734); Grove City, PA (8240); New Castle, PA (28, 334) and Pittsburgh, PA 369, 879).

The law requires me to examine how the drivers used their “off-duty” times en route. The Board’s *Manning* and *Johnson* decisions require I review where the drivers were located during such times. While I do so, I do not believe that those two decisions have taken the compensability analysis down the correct path by requiring an analysis of the character of the location in which an off-duty time period occurs. Those decisions create further uncertainty by forcing both the DOL and companies subject to the SCA to make choices and analyses based on detailed demographics and geography rather than merely examining the employees’ activities during the temporal periods at issue and determining who the activities benefit.

The examples set forth in the regulations regarding “on-duty” time do not consider the geographic setting of the employee’s work situs.²³ Nor does the specific illustration regarding a truck driver waiting “at or near the job site for goods to be loaded.” The genesis of the Board’s present requirement was an effort to support the findings of the administrative law judges who took the illustration in section 785.16(b), involving New York City, too far. The proper test articulated by the courts has been and should remain focused on whether the employer or the employee receives the predominant benefit of the break. Any geographic analysis is a diversion.

There is no such demographic or geographic analysis involved in determining the compensability of meal breaks. The geographic location of a meal break is largely irrelevant, other than to look at whether the employee remains “working” at her desk or factory machine while eating. The test is whether the employee is getting a bona fide meal break or working. Thus, whether the employee eats at a McDonalds in New York City or one in Altus, Oklahoma, is unimportant. Moreover, the regulations specify that it is not necessary that an employee be permitted to leave the premises as long as she is completely free of job duties. Similarly, demographics and geography play no role in the determination that short coffee or snack breaks, i.e., 10-20 minutes, do not qualify as meal periods. So, whether a Seattle worker can run to Starbucks or a Kingsbury, TX, worker to the local diner within the twenty minute coffee break is unimportant.

The drivers admitted they could have and did use their one hour and five minute breaks to buy greeting cards or make personal telephone calls. However, most of them stayed in their trucks and read, ate, paid bills, listened to music, or played crossword puzzles. But, they were not required to remain with their trucks. A number of drivers completed work-related paper work, such as their DOT driver logs, but were not required to do so by either RTC or the DOT at that time. Mr. Marangoni took it upon himself to check the oil and walk around his truck, but admittedly was not required to do so. The drivers’ duty to complete their DOT logs is their independent responsibility under DOT regulations as well as RTC’s obligation. 49 C.F.R. § 395.8(a). Thus, although RTC was benefitted, an “effect”, one cannot say completing the logs was predominantly for RTC’s sake or for that matter predominantly for the employees’ benefit. Even on the 128-mile portion between Erie, PA, and Pittsburgh, PA, there were many areas the

²³ The “on-call” examples consider whether the employee is on or off the employer’s premises, but not whether those premises are in Kingsbury, TX, or New York City.

drivers could have stopped for their breaks and effectively used the time for their own purposes or for meals. In fact, many of the truck stops were like mini-malls with a great variety of diversions. It is not established that RTC was predominantly benefitted by the drivers' activities during those off-duty periods. It can be argued that RTC profited by not compensating the drivers for the off-duty periods while saving enough in wages to pay the added tolls. But, on the other hand, the drivers also profited by having more work hours in fewer days. But, that would be the wrong focus. For the relevant inquiry is whether the drivers' activities during the off-duty periods predominantly benefitted RTC or the former. Here, the reading, radio listening, telephone calls, bill paying, etc., did not predominantly benefit RTC. The fact the drivers chose to stay with the trucks, not deviate greatly from their route, and complete drivers' paper work, does not change the result.²⁴

The difficulty with the DOL's position in this case is that it focuses so narrowly on the definition of "off-duty" time to the exclusion of consideration of other time period definitions, such as meal times and "waiting" times. The DOL argues that while one uncompensated half-hour meal period during the entirety of these routes is appropriate, three lengthy "meal" breaks are inconsistent with the regulations.²⁵ Mr. Waldow had, in fact, excluded one permissible meal period in his calculations of back wages owed. I observe that the regulations themselves specify that ordinarily "30 minutes or more" is needed for a meal break to be considered bona fide. Thus, I cannot subscribe to DOL's position here that only one 30-minute meal break is appropriate on these routes.

These drivers were not working an eight-hour shift. Their typical day was fourteen some hours long from beginning to end. In our society, it is customary to have three meal breaks, i.e., breakfast, lunch and dinner, of at least 30-minutes duration, during the twelve-to fifteen hour period between 6:00 A.M. and 9:00 P.M..²⁶ If a meal break was appropriate at the mid-route point, as the DOL agrees, the fact it lasted an hour to 1 1/4 hours did not make it compensable. The drivers had no work-related duties during the scheduled meal periods and thus those periods were non-compensable.

I find that two of the periods en route, in each of the routes, constituted reasonable meal breaks for which the employees were not entitled to compensation. So, for example, if a driver began route 804-805 (5/21/98) in Pittsburgh at 10:00 A.M. and drove 2 hours and 45 minutes

²⁴ *Johnson and Manning* suggest that an employee's diversion predilections may be significant. That is, since there were only two movie theaters in Cuba, NM, and two diners in Kingsbury a driver laying over in those places who was not very interested in movies or dining could find no effective use of his time. Requiring consideration of such factors would lead to a slippery slope. What may occupy a cowboy-driver or yogi-driver may not effectively occupy a driver who prefers opera.

²⁵ RTC argues DOL conceded the middle breaks in the routes are bona fide meal periods. (TR 352-354). In fact, Mr. Waldow inexplicably, did limit the time of the one permissible meal break to ½ hour in his calculations, as the DOL now argues. Mr. Waldow essentially approved the breaks "at the top of the trips", in Pittsburgh or Rochester, as appropriate meal breaks.

²⁶ Obviously, some workers function on a 7:00 A.M. to 7:00 P.M. or other 12-hour schedule. But, nonetheless, three meal periods are common.

toward Rochester, taking a 1 hour and 5 minute break at 1:00 P.M. before continuing on to Rochester, that constituted a reasonable meal break. According to DOL, the break at the Rochester destination from 4:25 P.M. through 5:40 P.M. before beginning the return drive to Pittsburgh constituted a reasonable meal break. Likewise, the one-hour and 5 minute break, from 1:00 P.M. until 2:05 P.M. and the 4:45 P.M. through 5:35 P.M. break, for route 803-806 (5/21/98), constituted reasonable meal breaks.

The employees were completely relieved of duty, during these breaks, they were informed they were so relieved and they not required to remain in or near their trucks. The employees did not remain with the trailers in which the mail was packed. The breaks were long enough for the employees to eat and make use of the meal period as they wished.²⁷ These meal breaks were predominantly for the employee's benefit; they would presumably occupy the employees' time whether they were on-duty or not. The drivers were not required to take care of RTC's property during these periods. Their time to eat did not predominantly benefit RTC, but rather gave the drivers an opportunity to make personal calls, read, eat and relax at or near adequate facilities. A collateral benefit to RTC would be that the drivers would ordinarily be refreshed and thus, presumably, safer drivers. Moreover, these reasonable approximate 1-hour layovers were only a fraction of the 9-hour layover found compensable in the *Manning* case and the 2-4-hour layovers in *Johnson*.²⁸

Last En Route Break

The third, uncompensated, one-hour to one-hour-and-five-minute off-duty periods found in the typical RTC schedules are more problematic. On January 17, 2000, a number of schedule changes were made, reducing the time for this third, uncompensated, off-duty period (9:00 P.M.-9:35 P.M.) to 35 minutes, e.g., route 804-805. This break took place on the second or return leg (Rochester to Pittsburgh) of the trip originating in Pittsburgh at 9:45 A.M.. The driver would have had a one-hour-five-minute lunch break at 1:00 P.M. and a one-hour-fifteen-minute dinner break in Rochester at 4:25 P.M.. At 9:00 P.M., the Pittsburgh driver would have been on the road again for 3 hours and ten minutes since leaving Rochester and faced another one hour and 45 minutes ahead before reaching Pittsburgh. A 35-minute break at this point (1/17/02 schedule) appears very reasonable. When the route 804-805 break had been 1:05 long, Mr. Gaertner testified he had "killed time" by listening to the radio. Route 803-806 had two 1:05 hour breaks on the road and a 50-minute break at the Pittsburgh BMC. Mr. Whalen testified he would usually eat during the two 1:05-hour breaks en route and just have coffee in the USPS "swing" room while at the Pittsburgh BMC. He never skipped the 1:00 P.M. 1:05-hour break because he liked to have the break to eat lunch.

²⁷ 29 C.F.R. § 785.19(a) states, "Ordinarily 30 minutes or more is long enough for a bona fide meal period."

²⁸ In *Manning*, the drivers' runs covered a period of 16 1/4 hours, but they were compensated for only 5 hours of work! In *Bishop*, the drivers' shifts were 16 hours with only each hours 15-minute drive being compensated. The Board ordered the 45-minutes between runs compensated.

Under the regulations, usually, short rest periods, 15-20 minutes, are considered hours worked and are compensable. In *Marti*, where the beer distributor loading employees had three breaks totaling 2 hours, the court observed that generally breaks of at least 30 minutes were not compensable, but those under twenty minute were. Since these 35-minute breaks here were at least double the duration of the illustrative compensable breaks set forth in the regulations, I conclude they were appropriately considered non-compensable “off-duty” times. Had they been only 15-20 minutes duration, they would have been compensable. The 5/21/98 schedule for route 804-805 gave the drivers a one-hour and five-minute break at 9:00 P.M. on this route. This non-compensable break gave drivers even more time to attend to their personal affairs, needs, and desires.

The break time was regularly scheduled, although the drivers could vary the time and place they took this last break of their trips. The drivers were explicitly told in advance that they were completely relieved of duty during this break. The time was long enough for the drivers to effectively use the time for themselves and the drivers had a decent choice of facilities at which to take the breaks. Based on Mr. Bass’s testimony, there are likely more amenities at any single truck stop than in the entire town of Kingsbury, Texas. Mr. Bass had looked at nineteen stops along the RTC routes. Although some drivers completed their DOT logs, many read, some shopped, some made personal telephone calls, some ate, some shopped for cigarettes, some did crossword puzzles, and most used restroom facilities. At least one, Mr. Dzikowski, felt there was nothing he could do so he remained in his truck parked at a BP Station or at an Indian Reservation but even he would buy cheaper cigarettes there. The drivers were not required to complete their logs during this last off-duty period. In fact, RTC written guidance suggested they complete their logs while fueling. Since a hiatus was needed somewhere en route to meet the USPS strict schedules, RTC received some benefit from these breaks they built into the schedule. However, the drivers themselves were predominantly benefitted from their activities during these breaks. The drivers mostly used the time for their own purposes. Moreover, the round-trip methodology instituted by RTC gave the drivers more work hours each week concentrated over fewer days, unlike the older relay method. This was another benefit to the drivers. Finally, the breaks, although some may have felt they were inconvenient or ill-timed, were regularly scheduled and predictable. Unlike the court reporter, the messenger, the fireman, and the factory worker in the DOL’s examples, who are “engaged to wait” for unpredictable jobs of short duration and must therefore be compensated, RTC’s drivers were “waiting to be engaged” during these periods.

One must bear in mind that the employees here are not office workers who comfortably sit in their offices between 8:00 A.M. and 5:00 P.M. and can run downstairs to the building cafeteria for a lunch hour and for coffee breaks. Perhaps the nature of an employee’s work should be a greater consideration in determining compensability. Employees in the trucking industry necessarily face additional rigors entailed in traveling, just as airline, shipping, railroad, and other transportation workers do. Moreover, for USPS mail haulers adherence to strict delivery and pick-up times and inflexible scheduling with inherent hiatuses is part of the business. In many instances, company agreements with drivers or unions have ameliorated the some of the hardships they face or at least established added compensability. However, here, we enforce the law. Some

amount of uncertainty has been perpetuated in the regulations and the employer need not be penalized for trying his best both to comply with the law and to make his business succeed.

Although RTC's route schedules have evolved and recently become more and more reasonable, one older schedule posed a problem. The employer has committed a *de minimus* violation by not compensating the drivers of route 809-808, under the May 21, 1998, schedule for the short 15-minute off-duty periods spent mid-route at the Pittsburgh BMC. These breaks were too short to be effectively used for the drivers' own purposes and other the analytical criteria set forth above should have been compensated. This went on until the schedule was changed on December 6, 1999. From the evidence presented I am unable to determine either the number of drivers who should have been compensated or the amount owed by RTC.

Pre-trip Periods

DOL also argues that the compensable 15 minutes RTC scheduled for pre-trip activities, including inspections was insufficient and that additional compensable pre-trip time was needed. Mr. Waldow testified that most of the RTC Cranberry drivers he interviewed informed him that although they were paid for pre-trip and post-trip inspections and fueling, they nearly universally said it was not enough time to perform these tasks within the scheduled time; they felt they needed an additional 15 minutes. Thus, Mr. Waldow calculated they needed 1/4 hour more per round trip. However, DOL witness Mr. Gaertner testified that his pre-trip inspection took about ten to fifteen minutes. The DOL suggests that the fact RTC added some pre-trip time, as reflected in their March 29, 1999 memorandum, is proof that such additional time was needed. (PX 9). It was shown that some drivers, such as Messrs. Kelly, Dzikowski and Gaertner, chose to report to RTC ten to fifteen minutes earlier than scheduled (in 1999) and some would perform their pre-trip inspection then. Mr. Dzikowski was not paid for this extra 15 minutes, but he had not submitted exception reports. Conscientious Mr. Marangoni believed the time allotted for pre-trip activities was enough if there was no traffic. It took Mr. Marangoni 10-15 minutes to inspect his tractor and another 10 minutes to inspect the trailer. Other drivers equivocated and testified sometimes they could perform the inspection in fifteen minutes, but sometimes it takes a few minutes longer. (TR 91-92, 115-116, 131, 155, 179-180, 201). Mr. Whalen testified he can complete his pre-trip inspection of the tractor in 15 minutes with the trailer taking another 7-8 minutes.

Messrs Rood, Packo, and Bass all testified that RTC's compensated, scheduled, pre-trip periods and post-trip periods were adequate. RTC's written guidance informed drivers to submit exception reports if the scheduled inspection or travel times were insufficient. Mr. Packo admitted 15 minutes for pre-trip travel time had been added to only to routes originating in Pittsburgh during the middle of the investigation period, due to traffic congestion in Cranberry, PA, where the Pittsburgh BMC is located. (TR 442, 473). Some drivers appeared early for the pre-trip phase of their own accord. For example, Mr. Gaertner arrived early to install his CB. The RTC witnesses also established that drivers could and some did submit exception reports and were compensated for additional times precipitated by traffic congestion, fueling and overly-long pre-trip inspections. (Marangoni Dep. pp. 56-57). DOT regulations require a daily vehicle inspection. 49 C.F.R. § 396.11. The requirement does not call for a comprehensive inspection.

There was an unspecified time period between May 21, 1998, when the schedule for route 804-805 was implemented and March 29, 1999, when RTC gave the drivers of that route an additional 15 minutes to travel to the Pittsburgh BMC, when the travel time was not adequate for traffic and construction impediments. However, the drivers should have submitted exception reports for any delays and some did. Given the vague testimony and evidence regarding this period, the availability and use of RTC exception reports, and the varying short amounts of time involved, I consider any violation here *de minimus*.

I find the pre-trip periods were not proven to be inadequate and even if they were, at times, somewhat inadequate and uncompensated, these occasions and times were *de minimus*. See, *Anderson, supra*, and *Brock v. City of Cincinnati*, 236 F.3d 793, 804 (6th Cir. 2001). RTC should, however, not consider my determination as a license not to compensate drivers for traffic or construction delays absent the filing of exception reports, in the future.

Fringe Benefits

The fringe benefit matter was ill-proved. DOL argues that Mr. Rood and Ms. Newel admitted the fringe benefits payments were not being paid at least quarterly, as required by 29 C.F.R.

§ 4.175(d). In fact, Mr. Rood admitted this for 2001. However, Ms. Newel testified that all the payments were current during the “relevant” period. (TR 760, 768-772). RX 21-23 also show that payments were made nearly monthly between February 1998 and December 4, 2000. The DOL admits Mr. Rood made an attempt to verify that his pension payment actions complied with ERISA, but not the SCA. Mr. Waldow confirmed that ERISA, unlike the SCA, required pension payments only once a year. (TR 222-224). He testified that RTC was not making payments to the plan at the time he interviewed Mrs. Rood (1999). Messrs. Kosto’s, Whalen’s and Montalvo’s testimony regarding pension contributions was totally unhelpful. DOL witness Mr. Gaertner’s testimony that he had been told by Scudder that RTC’s pension payments were thirteen months behind was vague and unreliable hearsay. Mr. Marangoni’s testimony that Mr. Rood had stuck to his commitment to contribute to the pension fund once a year and that he had checked the status of his account on the internet about every two months was vague. He testified that when he had last checked his pension RTC’s contributions were almost a year behind although his April 2002 statement showed an RTC deposit. With this testimony, the DOL has established RTC had not made the pension fund deposits quarterly, in 2001, as required.

Back Pay

It is well-settled that the Secretary of Labor may obtain back wages for non-testifying employees where the record and testimony of testifying witnesses establishes they are entitled to compensation. See, *In The Matter of Structural Services*, WAB Case No. 82-13 (June 22, 1983). See also, *Matter of Schnabel Associates, Inc.*, WAB Case No. 89-18 (June 28, 1991); and, *M.G. Allen and Associates*, 29 WH Cases (BNA) 374 (1988) *citing both Structural Services and Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 1187 (1946). Likewise, it is permissible to award back pay to non-testifying employees based on the representative testimony

of a small number of employees. *RC Foss*, WAB No. 87-46 (1990). Back wages have been awarded where no employee testified. *B & B Contractors*, WAB No. 89-04 (1991). Thus, had the DOL established its complete case concerning the compensability of the “off-duty” periods, it met its burden of proving the amounts due to the drivers.

I calculate the amount owed as follows:

There were 76 weeks between 5/21/98 and 12/5/99, the period of this schedule, 27 in 1998 and 49 in 1999. The drivers’ wage was 14.41 in 1998 and 1999. A quarter hour of pay was involved or \$3.603. There were 16 drivers employed on these routes with only 12 employed during the entire period.²⁹ Each driver made four trips per week involving this deficiency which adds up to 304 trips per driver. That amounts to 4864 driver/trips. Multiplying the driver trips by the wage results in the sum of \$17,295.00. From that I subtracted the 1096 driver/trips for the four drivers not employed during the entire period, which amounts to \$3949.00. Deducting the \$3949 from the \$17,295 results in a back wage liability of \$13,346.00.

This calculation has not been accomplished with scientific precision. Should the parties disagree on this amount, they must either provide both the names of drivers affected and the amount of back wages owed for the violation or an agreed upon amount. I encourage the parties to agree to any such amount.

Debarment

Repayment of wages owed is not the penalty for a violation, rather debarment is. 41 U.S.C. § 354(a); 29 C.F.R. § 4.188(b)(2). Ineligibility for further federal contracts for a period of three years when violations occur is the rule. 41 U.S.C. § 354(a); 29 C.F.R. § 4.188; *DOL v. Glaude*, ARB No. 98-081 (1999). Section 354(a) is “a particularly unforgiving provision of a demanding statute.” *A to Z Maintenance Corp.*, *infra*, at 855. The legislative history of the SCA makes it clear that only the most “compelling of justifications” should relieve a contractor from the sanction. *Glaude citing Vigilantes, Inc. v. DOL*, 968 F.2d 1412, 1418 (1st Cir. 1992). However, the same history demonstrates that debarment may be inappropriate when the violation is a minor one, inadvertent, or wholly disproportionate to the offense. 29 C.F.R. § 4.188(b)(2).

The Secretary’s power to find “unusual circumstances” “mitigates the facial harshness of § 354(a).” *A to Z Maintenance Corp.*, *infra*, at 855. The violator of the Act has the burden of establishing the existence of “unusual circumstances” to warrant relief from the debarment sanction. 29 C.F.R. § 4.188. This provision “contemplates the Secretary of Labor’s authority to free the federal government (and the national labor pool) from chronic contract violators . . . *A to Z Maintenance Corp. v. Dole*, 710 F.Supp. 853, 859 (D.D.C. 1989). In *Glaude*, *supra*, the Board referred to the burden as a “daunting task” requiring the violator to “run a narrow

²⁹ The four not employed during the entire period are: Kelly, Thomas P.; Lounsbury, Donald; Marangoni, Larry; and, Whalen, Thomas.

gauntlet.”³⁰ The term “unusual circumstances” is not defined in the Act, but what does and does not constitute “unusual circumstances” is illustrated in 29 C.F.R. 4.188(b)(1)-(6). “Unusual circumstances” do not include negligent or willful disregard of legal requirements or ignorance. They may include whether a bona fide legal issue of doubtful certainty was involved. A three part test has been developed to determine the existence of “unusual circumstances.”

If a violator’s conduct in causing or permitting SCA violations is wilful, deliberate, or of an aggravated nature or where the violations are the result of culpable conduct, such as culpable neglect to ascertain whether the practices in question are violations, culpable disregard of whether they were in violation or not, or culpable failure to comply with record keeping requirements, relief from the debarment sanction cannot be in order.³¹ 29 C.F.R. § 4.188(b)(3)(i). This has been referred to as the first one of the three tests. *Glaude*. If such aggravating factors exist, the analysis does not proceed to the second test. Similarly, relief from the debarment sanction cannot be in order when a contractor has a history of similar violations, when a contractor has repeatedly violated the Act, or when previous violations were serious in nature. 29 C.F.R. § 4.188(b)(3)(i).

If no such conduct existed, the second test is the existence of “[A] good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief.” 29 C.F.R. § 4.188(b)(3)(ii).

The third test is reached “only if the mandatory conditions set out in parts one and two have been satisfied.” *Glaude*. The third test for relief from debarment is whether the contractor has been previously investigated for violations of the Act, whether he has committed record keeping violations which impeded the investigation, whether liability is dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor’s efforts to ensure compliance, the nature, extent and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid. 29 C.F.R. § 4.188(b)(3)(ii).

In *Bishop v. Safeway Moving & Storage*, BSCA Case No. 92-12 (Nov. 30, 1992), the Board of Service Contract Appeals found the respondent’s contention that this was a bona fide legal issue of doubtful certainty without merit because simply consulting with the DOL would have resolved the issue. In fact, the regulations state:

A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act and cannot itself resolve questions which arise, but rather must seek advice from the DOL.

³⁰ In *Glaude* the violating contractor was debarred having failed all three tests. It had not sought DOL advice and persisted in adhering to a position flatly contrary to the Act and regulations. Nor did the violator prove unusual circumstances.

³¹ “Culpable” means, “deserving blame or censure.” The Random House College Dictionary, p. 325. (Revs’d Ed. 1975).

29 C.F.R. § 4.188(b)(4).

In this case, even if I had found RTC had violated the SCA, as fully alleged, I would not have found debarment appropriate. Unusual circumstances are established. First, debarment would have been a pyrrhic victory and wholly disproportionate to the alleged offense. While a number of drivers and ex-drivers would have received some back pay, RTC would likely go out of business and more than a hundred current employees would lose their jobs. RTC's only business was hauling mail for the USPS. Secondly, although some might argue that the issues in this case were not close calls, I find otherwise as I have struggled with the regulations and various statutory interpretations. It would be trite to say the matter could have been resolved simply by consulting DOL, particularly when reasonable minds can differ over the resolution of the issues herein. I observe that although the *Manning* and *Johnson* cases were decided in 1990, the DOL has not changed the example in its regulations (29 C.F.R. § 785.16(b)) regarding the 6-hour non-compensable layover in New York City to inform the trucking industry that the remote location of a layover may be a determinative factor.³²

A bona fide legal issue of doubtful certainty regarding the breaks existed here. Mr. Rood's casual manner of investigating the law, although ill-guided, should not be wholly ignored. The evidence of any prior violation of the SCA by RTC showed it was at best *de minimus*. I do not find RTC's conduct in causing or permitting the purported SCA violations, had they been established, was wilful, deliberate, or of an aggravated nature or that the purported violations were the result of culpable conduct, such as culpable neglect to ascertain whether the practices in question were violations, or culpable disregard of whether they were in violation or not, or culpable failure to comply with record keeping requirements. Moreover, RTC cooperated in the investigation and had improved its route scheduling in January 2000. Thus, had I found all the violations of the SCA, as alleged, I would not have recommended debarment. The two established violations are minor and were not the motivating factors in DOL initiating this case.

CONCLUSIONS

It is established that the Respondents violated the SCA and implementing regulations by: (1) not paying its drivers of route 809-808, under the May 21, 1998, schedule, for the short 15-minute off-duty periods spent mid-route at the Pittsburgh BMC, through December 5, 1999; and, (2) by not making quarterly pension fund contributions as required in 2001. While some additional pre-trip travel time should have been added to the routes originating in Pittsburgh during the period of construction in Cranberry, PA, the drivers could have, should have and some did file exception reports for compensation. For those drivers that had not submitted exception reports, the violation was *de minimus*.

The drivers were entitled to at least two uncompensated meal breaks during their 14-hour days. They were completely relieved of duty during the meal break and received the predominant

³² Although *Johnson* and *Manning* are the law, I do not recommend consideration of the remoteness of a layover area as a determinative factor, as I have discussed above.

benefit of their activities during the meal breaks. While 30 minutes may have been a more reasonable period to allot for each of the two meal breaks, the Respondents did not violate the Act by allotting more time. Finally, the third, regularly scheduled, uncompensated off-duty period, of 35 to 65 minutes, on each route considered, while perhaps longer than desirable, was a lawful uncompensated break. The drivers were told in advance of the specific parameters of the breaks which could be taken at adequate facilities or in off-route sizable towns and they were completely relieved of duties during those periods.

Debarment is not appropriate for the minor violations found, nor would it have been appropriate had all the allegations been proven. The Respondents made an effort to ascertain the propriety of not compensating the off-duty periods. The compensability of the off-duty periods in this matter is a complex legal matter upon which reasonable minds can differ. RTC has cooperated in the investigation and has a good record as a government contractor. The implementing regulations had not incorporated the additional "remoteness" factor added by the Board's 1990 decisions which left the trucking industry uninformed. Debarment would likely result in the loss of employment for the very employees the DOL seeks to protect and RTC's bankruptcy. Finally, any violations here were *de minimus*.

ORDER

WHEREFORE, IT IS ORDERED THAT:

1. The Respondents pay to the DOL the amount of back wages due, \$13,346.00. The DOL reimburse the attached list of drivers the back wages due for the unpaid 15-minute break on route 809-808. Should the parties not agree with the correctness of this amount:

A. the DOL may ascertain the names of the drivers affected and the amount of compensation due the drivers of route 809-808, under the May 21, 1998, schedule, for the short 15-minute "off-duty" periods spent mid-route at the Pittsburgh BMC, through December 5, 1999; and,

B. absent agreement, DOL submit the figures within 30 calendar days from the date of this decision. RTC may submit any challenges or corrections within 7 calendar days thereafter; or,

C. the parties attempt to agree on the amount due and submit their agreement not later than 30 calendar days from the date of this decision.

2. That sufficient funds owed by the USPS to RTC, under the contract, be withheld to compensate the drivers affected.

3. The Respondents continue to deposit their pension funds quarterly as required by the regulations implementing the SCA.

4. No relief from the ineligible list will be permitted unless the Respondents pay the back wages due.

5. Each party shall be responsible for their own attorney fees and expenses of litigation.

If review of this decision is desired, the Respondents have 40 business days from the date of this decision to file a Petition for Review with the Administrative Review Board, U.S. Department of Labor, Washington, DC 20210 (the "Board"), under 29 C.F.R. § 6.20. Such filing will have the effect of making this decision inoperative unless and until the Board either declines to review the decision or issues an order affirming the decision.

A

RICHARD A. MORGAN
Administrative Law Judge

RAM:dmr

APPENDIX A

Capuano, Thomas
Dzikowski, Norman
Gaertner, William J.
Kelly, Thomas P.
Kosto, Raymond
Leathersich, William
Lounsbury, Donald

Marangoni, Larry
Marshall, Robert E.
McCartney, Bruce
Mitchell, John
Montalvo, Wilson
Scott, William
Semplice, Phillip
Teets, Kenneth
Whalen, Thomas